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United Nations

Report of the International Law Commission

Fifty-third session
(23 April-1 June and 2 July-10 August 2001)

General Assembly
Official Records
Fifty-sixth session
Supplement No. 10 (A/56/10)

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CHAPTER I

Introduction

1. The International Law Commission held the first part of its fifty-third session from 23 April to 1 June 2001 and the second part from 2 July to 10 August 2001 at its seat at the United Nations Office at Geneva.

A. Membership

2. The Commission consists of the following members:

Mr. Emmanuel Akwei Addo (Ghana)
Mr. Husain Al-Baharna (Bahrain)
Mr. Joao Clemente Baena Soares (Brazil)
Mr. Ian Brownlie (United Kingdom)
Mr. Enrique J.A. Candioti (Argentina)
Mr. James Richard Crawford (Australia)
Mr. Christopher John Robert Dugard (South Africa)
Mr. Constantin Economides (Greece)
Mr. Nabil Elaraby (Egypt)
Mr. Giorgio Gaja (Italy)
Mr. Zdzislaw Galicki (Poland)
Mr. Raul Ilustre Goco (Philippines)
Mr. Gerhard Hafner (Austria)
Mr. Qizhi He (China)
Mr. Mauricio Herdocia Sacasa (Nicaragua)
Mr. Kamil E. Idris (Sudan)
Mr. Jorge E. Illueca (Panama)
Mr. Peter C.R. Kabatsi (Uganda)
Mr. Maurice Kamto (Cameroon)
Mr. James Lutabanzibwa Kateka (United Republic of Tanzania)
Mr. Mochtar Kusuma-Atmadja (Indonesia)
Mr. Igor Ivanovich Lukashuk (Russian Federation)
Mr. Teodor Viorel Melescanu (Romania)
Mr. Djamchid Momtaz (Islamic Republic of Iran)
Mr. Didier Opertti-Badan (Uruguay)

Mr. Guillaume Pambou-Tchivounda (Gabon)
Mr. Alain Pellet (France)
Mr. Pemmaraju Sreenivasa Rao (India)
Mr. Victor Rodriguez Cedeño (Venezuela)
Mr. Robert Rosenstock (United States)
Mr. Bernardo Sepúlveda (Mexico)
Mr. Bruno Simma (Germany)
Mr. Peter Tomka (Slovakia)
Mr. Chusei Yamada (Japan)

B. Officers and the Enlarged Bureau

3. At its 2665th meeting on 23 April 2001, the Commission elected the following officers:

Chairman: Mr. Peter C.R. Kabatsi
First Vice-Chairman: Mr. Gerhard Hafner
Second Vice-Chairman: Mr. Enrique J.A. Candioti
Chairman of The Drafting Committee: Mr. Peter Tomka
Rapporteur: Mr. Qizhi He

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission[1] and the Special Rapporteurs.[2]

5. On the recommendation of the Enlarged Bureau the Commission set up a Planning group composed of the following members: Mr. Gerhard Hafner (Chairman), Mr. E.A. Addo, Mr. J.C. Baena Soares, Mr. I. Brownlie, Mr. K. Idris, Mr. Z. Galicki, Mr. M. Kamto, Mr. M. Kusuma-Atmadja, Mr. A. Pellet, Mr. R. Rosenstock, Mr. C. Yamada, Mr. Q. He (ex-officio).

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[1] Mr. J.C. Baena Soares, Mr. Z. Galicki, Mr. A. Pellet, Mr. P.S. Rao and Mr. C. Yamada.

[2] Mr. J.R. Crawford, Mr. C.J.R. Dugard, Mr. A. Pellet, Mr. P.S. Rao and Mr. V. Rodriguez Cedeño.

C. Drafting Committee

6. At its 2666th, 2669th and 2679th meetings on 24 April, 27 April and 23 May 2001 respectively, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) International liability for injurious consequences arising out of acts not prohibited by international law (Prevention of transboundary damage from hazardous activities): Mr. Peter Tomka (Chairman), Mr. Pemmaraju Sreenivasa Rao (Special Rapporteur), Mr. J.C. Baena Soares, Mr. I. Brownlie, Mr. Z. Galicki, Mr. G. Gaja, Mr. G. Hafner, Mr. M. Herdocia Sacasa, Mr. J. L. Kateka, Mr. T.V. Melescanu, Mr. D. Opertti-Badan, Mr. V. Rodriguez Cedeño, Mr. R. Rosenstock, Mr. C. Yamada and Mr. Q. He (ex-officio).

(b) State responsibility: Mr. P. Tomka (Chairman), Mr. J. Crawford (Special Rapporteur), Mr. I. Brownlie, Mr. E.J.A. Candioti, Mr. C.J.R. Dugard, Mr. C. Economides, Mr. G. Gaja, Mr. Z. Galicki, Mr. I. Lukashuk, Mr. D. Momtaz, Mr. G. Pambou-Tchivounda, Mr. A. Pellet, Mr. R. Rosenstock, Mr. B. Simma, Mr. C. Yamada and Mr. Q. He (ex-officio).

(c) Reservations to treaties: Mr. P. Tomka (Chairman), Mr. A. Pellet (Special Rapporteur), Mr. H. Al-Baharna, Mr. E. Candioti, Mr. C. Economides, Mr. G. Gaja, Mr. G. Hafner, Mr. M. Kamto, Mr. T.V. Melescanu, Mr. V. Rodriguez Cedeño, Mr. R. Rosenstock, Mr. B. Simma and Mr. Q. He (ex-officio).

7. The Drafting Committee held a total of 34 meetings on the three topics indicated above.

D. Working Groups

8. At its 2673rd, 2688th and 2695th meetings on 4 May, 12 and 25 July 2001 respectively, the Commission also established the following Working Groups composed of the members indicated:

(a) State responsibility:

- *Commentaries*: Mr. T.V. Melescanu (Chairman), Mr. I. Brownlie, Mr. E.J.A. Candioti, Mr. J. Crawford, Mr. C.J.R. Dugard, Mr. C. Economides, Mr. G. Gaja, Mr. D. Momtaz, Mr. G. Pambou-Tchivounda, Mr. B. Sepulveda, Mr. P. Tomka and Mr. Q. He (ex-officio).
- *Outstanding issues*: Open-ended informal consultations chaired by the Special Rapporteur.

(b) Diplomatic protection: Open-ended informal consultations chaired by the Special Rapporteur, Mr. C.J.R. Dugard.

(c) Unilateral acts of States: Open-ended Working Group chaired by the Special Rapporteur, Mr. Rodgriguez Cedeño.

E. Secretariat

9. Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, opened the session and represented the Secretary-General. Mr. Václav Mikulka, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Ms. Mahnoush H. Arsanjani, Deputy Director of the Codification Division, acted as Deputy Secretary to the Commission. Mr. George Korontzis, Mr. Renan Villacis, Legal Officers, Mr. Arnold Pronto and Ms. Ruth Khalastchi, Associate Legal Officers, served as Assistant Secretaries to the Commission.

F. Agenda

10. At its 2665th meeting, on 23 April 2001, the Commission adopted an agenda for its fifty-third session consisting of the following items:

1. Organization of work of the session.
2. State responsibility.
3. Diplomatic protection.
4. Unilateral acts of States.
5. Reservations to treaties.
6. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities).
7. Programme, procedures and working methods of the Commission and its documentation.
8. Cooperation with other bodies.
9. Date and place of the fifty-fourth session.
10. Other business.

CHAPTER II

SUMMARY OF THE WORK OF THE COMMISSION AT ITS FIFTY-THIRD SESSION

11. Concerning the topic "State Responsibility", the Commission considered the fourth report[3] of the Special Rapporteur. The Commission also completed the second reading of the topic (chapter IV). The Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly that it take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution, and that it annex the draft articles to the resolution. The Commission decided further to recommend that the General Assembly consider, at a later stage, and in light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles on responsibility of States for internationally wrongful acts with a view to adopting a convention on the topic.

12. With regard to the topic of "International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)", the Commission completed the second reading of the topic (chapter V). The Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly the elaboration of a convention by the Assembly on the basis of the draft articles on Prevention of transboundary harm from hazardous activities.

13. As to the topic "Reservations to treaties", the Commission considered the portions of the fifth report[4] of the Special Rapporteur which were not considered last year and his sixth report.[5] The Commission adopted 12 draft guidelines dealing with formulation of reservations and interpretative declarations. The Commission also referred 13 draft guidelines dealing with form and notification of reservations and interpretative declarations to the Drafting Committee (chapter VI).

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[3] A/CN.4/517 and Add.1.

[4] A/CN.4/508/Add.3 and 4.

[5] A/CN.4/518 and Add.1-3.

14. With regard to the topic "Diplomatic protection", the Commission considered the portions of the first report of the Special Rapporteur,[6] dealing with question of continuous nationality and transferability of claims which were not considered last year and his second report dealing with the issue of the exhaustion of local remedies.[7] The Commission referred draft articles 9, 10 and 11 dealing with the questions of continuous nationality and transferability of claims and the exhaustion of local remedies to the Drafting Committee. The Commission also established an open-ended Informal Consultations to consider the question of continuous nationality and transferability of claims (chapter VII).

15. As regards the topic "Unilateral acts of States", the Commission examined the fourth report of the Special Rapporteur.[8] The Special Rapporteur proposed draft articles (a) and (b) on the rules relating to interpretation of unilateral acts. The Commission considered the oral report of the Chairman of the Working Group on the topic, Mr. Victor Rodriguez Cedeño, and supported the proposal to request States for additional information on State practice relating to unilateral acts (chapter VIII).

16. The Commission continued traditional exchanges of information with the International Court of Justice, the Asian-African Legal Consultative Organization, the Inter-American Juridical Committee and the Committee of Legal Advisers on Public International Law of the Council of Europe (chapter IX, section C).

17. A training seminar organized by the United Nations Office at Geneva was held with 24 participants of different nationalities. Some members of the Commission gave lectures at the Seminar (chapter IX, section E).

18. The Commission decided that its next session be held at the United Nations Office in Geneva in two parts, from 6 May to 7 June and from 8 July to 9 August 2002.

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[6] A/CN.4/506/Add.1.

[7] A/CN.4/514 and Corr.1.

[8] A/CN.4/519.

CHAPTER III

SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

19. In response to paragraph 14 of General Assembly resolution 55/152 of 12 December 2000, the Commission would like to indicate the following specific issues for each topic on which expressions of views by Governments either in the Sixth Committee or in written form would be of particular interest in providing effective guidance for the Commission on its further work.

A. Reservations to treaties

(a) Conditional interpretative declarations

20. In 1997, the Commission decided to include the study of interpretative declarations in its work on the topic of reservations to treaties.[9] In 1999 it drew a distinction between "simple" interpretative declarations and conditional interpretative declarations, the definition of which is contained in draft guideline 1.2.1.[10] In moving ahead in its work, the Commission finds that the latter declarations are subject, *mutatis mutandis*, to the same legal regime as reservations themselves. Should this assimilation be confirmed in regard to the effects of reservations and of conditional interpretative declarations respectively, the Commission is considering the possibility of not including in its draft Guide to Practice draft guidelines specifically relating to conditional interpretative declarations.

21. The Commission would be particularly interested in receiving comments from States in this connection and would welcome any information on the practice followed by States and international organizations in connection with the formulation and the effects of conditional interpretative declarations.

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[9] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), paras. 113-115.

[10] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), p. 240.

(b) Late formulation of reservations

22. In the case of the draft guidelines adopted at the present session,[11] the Commission would like to receive more particularly comments from Governments on draft guideline 2.3.1: "Late formulation of a reservation".[12]

23. This guideline has been worded so that it is understood that this practice, which is a departure from the actual definition of reservations as contained in article 2 (d) of the 1969 Vienna Convention on the Law of Treaties and reproduced in draft guideline 1.1,[13] should remain exceptional in view of the practice followed by depositaries and, in particular, by the Secretary-General of the United Nations.[14] Nevertheless, some members of the Commission consider that including this practice in the Guide could unduly encourage the later formulation of reservations. The Commission would like to receive the views of Governments on this issue.

24. Moreover, still in connection with the same draft guideline, the Commission would like to have the views of States on the advisability of using the term "objection", not within the meaning of article 20 of the 1969 Vienna Convention on the Law of Treaties of a declaration whereby a State objects to the *content* of a reservation, but to signify opposition to its late *formulation*.[15]

(c) Role of the depositary

25. The Special Rapporteur on reservations to treaties devoted a part of his sixth report[16] to the role of the depositary in the communication of reservations. He proposed to reproduce in the Guide to Practice, by adapting them to the particular case of reservations, the provisions of

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[11] See chapter VI above.

[12] "Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other contracting Parties objects to the late formulation of the reservation".

[13] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196-199.

[14] Letter from the Legal Counsel of the United Nations, LA 41TR/221 (23-1).

[15] Possible alternatives such as "rejection" or "opposition" have been proposed.

[16] A/CN.4/518/Add.2, paras. 156-170.

articles 77 and 78 of the 1969 Vienna Convention. The problem nonetheless arises of whether it lies with the depositary to refuse to communicate to the States and international organizations concerned a reservation that is manifestly inadmissible, particularly when it is prohibited by a provision of the treaty.

26. The Commission would like to receive the views of States on this point before adopting a draft guideline in this regard.

B. Diplomatic protection

27. The Commission would welcome comments on the exceptions that may be made to the continuous nationality rule, including the conditions under which such exceptions would apply. In particular, comments would be appreciated on those exceptions to the rule concerning situations of involuntary change of nationality arising out of State succession or out of marriage or adoption.

28. The Commission would also welcome comments on the following questions relating to diplomatic protection in the context of legal persons:

(a) Do States, in practice, exercise diplomatic protection on behalf of a company when the company is registered/incorporated in the State, irrespective of the nationality of the shareholders? Or, do States, in addition, require that the majority, or a preponderance, of the shareholders of the company have the nationality of the protecting State before diplomatic protection will be exercised?

(b) May a State exercise diplomatic protection on behalf of shareholders that have its nationality when the company (registered/incorporated in another State) is injured by an act of the State of registration/incorporation?

C. Unilateral acts of States

29. The Commission draws attention to a questionnaire prepared by the Special Rapporteur which will be circulated to Governments. The Commission encourages Governments to reply to that questionnaire as soon as possible.

CHAPTER IV

STATE RESPONSIBILITY

A. Introduction

30. At its first session, in 1949, the Commission selected State responsibility among the topics which it considered suitable for codification. In response to General Assembly resolution 799 (VIII) of 7 December 1953 requesting the Commission to undertake, as soon as it considered it advisable, the codification of the principles of international law concerning State responsibility, the Commission, at its seventh session in 1955, decided to begin the study of State responsibility and appointed F.V. Garcia Amador as Special Rapporteur for the topic. At the next six sessions of the Commission, from 1956 to 1961, the Special Rapporteur presented six successive reports dealing on the whole with the question of responsibility for injuries to the persons or property of aliens.[17]

31. The Commission, at its fourteenth session, in 1962, set up a subcommittee whose task was to prepare a preliminary report containing suggestions concerning the scope and approach of the future study.[18]

32. At its fifteenth session, in 1963, the Commission, having unanimously approved the report of the Subcommittee, appointed Mr. Roberto Ago as Special Rapporteur for the topic.

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[17] For the six reports of the Special Rapporteur, see:

Yearbook ... 1956, vol. II, doc. A/CN.4/96, pp. 173-231;
Yearbook ... 1957, vol. II, doc. A/CN.4/106, pp. 104-130;
Yearbook ... 1958, vol. II, doc. A/CN.4/111, pp. 47-73;
Yearbook ... 1959, vol. II, doc. A/CN.4/119, pp. 1-36;
Yearbook ... 1960, vol. II, doc. A/CN.4/125, pp. 41-68; and
Yearbook ... 1961, vol. II, doc. A/CN.4/134, pp. 1-54.

[18] Ibid., p. 229 *et seq.*

33. The Commission received eight reports from the Special Rapporteur, at its twenty-first to thirty-first sessions, from 1969 to 1979.[19] The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic of "State responsibility" envisaged the structure of the draft articles as follows: Part One would concern the origin of international responsibility; Part Two would concern the content, forms and degrees of international responsibility; and a possible Part Three, which the Commission might decide to include, could concern the question of the settlement of disputes and the implementation of international responsibility.[20]

34. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading Part One of the draft articles, concerning "the origin of international responsibility".[21]

35. At its thirty-first session, in 1979, the Commission, in view of the election of Mr. Ago as a judge of the International Court of Justice, appointed Mr. Willem Riphagen, Special Rapporteur for the topic. The Commission received seven reports from Mr. Willem Riphagen,[22] for Parts Two and Three of the topic, at its thirty-second to thirty-eighth sessions, from 1980 to 1986.

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[19] For the eight reports of the Special Rapporteur, see:

Yearbook ... 1969, vol. II, doc. A/CN.4/217 and Add.1, pp. 125-156;
Yearbook ... 1970, vol. II, doc. A/CN.4/233, pp. 177-198;
Yearbook ... 1971, vol. II (Part One), doc. A/CN.4/246 and Add.1-3, p. 199;
Yearbook ... 1972, vol. II, doc. A/CN.4/264 and Add.1, p. 71;
Yearbook ... 1976, vol. II (Part One), doc. A/CN.4/291 and Add.1 and 2, pp. 3-55;
Yearbook ... 1977, vol. II (Part One), doc. A/CN.4/302 and Add.1-3;
Yearbook ... 1978, vol. II (Part One), doc. A/CN.4/318 and Add.1-4; and
Yearbook ... 1980, doc. A/CN.4/318/Add.5-7.

[20] *Yearbook ... 1975*, vol. II, pp. 55-59, doc. A/10010/Rev.1, paras. 38-51.

[21] *Yearbook ... 1980*, vol. II, (Part Two), pp. 26-63, doc. A/35/10, chap. III.

[22] For the seven reports of the Special Rapporteur, see:

Yearbook ... 1980, vol. II (Part One), p. 107, doc. A/CN.4/330;
Yearbook ... 1981, vol. II (Part One), p. 79, doc. A/CN.4/334;
Yearbook ... 1982, vol. II (Part One), p. 22, doc. A/CN.4/354;
Yearbook ... 1983, vol. II (Part One), p. 3, doc. A/CN.4/366 and Add.1;
Yearbook ... 1984, vol. II (Part One), p. 1, doc. A/CN.4/380;
Yearbook ... 1985, vol. II (Part One), p. 3, doc. A/CN.4/389; and
Yearbook ... 1986, vol. II (Part One), p. 1, doc. A/CN.4/397 and Add.1.

36. At its thirty-ninth session, in 1987, the Commission appointed Mr. Gaetano Arangio-Ruiz as Special Rapporteur to succeed Mr. Willem Riphagen, whose term of office as a member of the Commission had expired on 31 December 1986. The Commission received eight reports from Mr. Arangio-Ruiz, at its fortieth to forty-eighth sessions, from 1988 to 1996.[23]

37. At the forty-eighth session of the Commission, in 1996, the Commission completed the first reading of the draft articles of Parts Two and Three on State responsibility and decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles provisionally adopted by the Commission on first reading,[24] through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1998.

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[23] For the eight reports of the Special Rapporteur, see:

Yearbook ... 1988, vol. II (Part One), p. 6, doc. A/CN.4/416 and Corr.1 and 2 and Add.1/Corr.1 and 2;

Yearbook ... 1989, vol. II (Part One), p. 1, doc. A/CN.4/425 and Corr.1 and Add.1 and Add.1/Corr.1;

Yearbook ... 1991, vol. II (Part One), p. 1, doc. A/CN.4/440 and Add.1;

Yearbook ... 1992, vol. II (Part One), p. 1, doc. A/CN.4/444 and Add.1 and Corr.1 and Add.2 and 3;

Yearbook ... 1993, vol. II (Part One), p. 1, doc. A/CN.4/453 and Add.1 and Corr.1-3 and Add.2 and 3;

Doc. A/CN.4/461 and Add.1 and 2 and Add.2/Corr.1 and Add.3;

Doc. A/CN.4/469 and Corr.1 (English only) and Add.1 and 2; and

Doc. A/CN.4/476 and Corr.1 (English only) and Add.1.

[24] Report of the Commission on the work of its forty-eighth session, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), pp. 125-151. For the text of article 42, paragraph 3, and articles 47, 48 and 51 to 53, with commentaries, see ibid., pp. 152 *et seq.*

38. At its forty-ninth session, in 1997, the Commission established a Working Group on State Responsibility to address matters dealing with the second reading of the topic.[25] The Commission also appointed Mr. James Crawford as Special Rapporteur.

39. The Commission received three reports from the Special Rapporteur, Mr. James Crawford, at its fiftieth to fifty-second sessions, from 1998 to 2000.[26] The reports dealt with consideration of the draft articles for the purposes of second reading in the light of comments by Governments[27] and developments in State practice, judicial decisions and literature.

40. At its fifty-second session, in 2000, the Commission took note of the report of the Drafting Committee on second reading of the entire draft articles (A/CN.4/L.600*) which were provisionally adopted by the Drafting Committee.[28] The Commission decided to finalize the second reading of the draft articles at its fifty-third session, in 2001, in view of any further comments submitted by Governments with regard to the draft articles contained in document A/CN.4/L.600*.

B. Consideration of the topic at the present session

41. At its present session, the Commission had before it comments and observations received from Governments on the draft articles provisionally adopted by the Drafting Committee at the previous session[29] and the fourth report of the Special Rapporteur, Mr. James Crawford.[30] The report addressed the main issues relating to the draft articles in the light of the comments and

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[25] For the guidelines on the consideration of this topic on second reading adopted by the Commission on the recommendation of the Working Group, see ibid., paragraph 161.

[26] A/CN.4/490 and Add.1, Add.2, Add.2/Rev.1 (French only) and Add.2/Corr.1 (Arabic, Chinese, English, Russian and Spanish only) and Add.3, Add.4, Add.4/Corr.1, Add.5 and Add.6; A/CN.4/498 and Add.1-4; A/CN.4/507 and Add.1, Add.1/Corr.1, Add.1/Corr.2 (French only), Add.2, Add.2/Corr.1-2, Add.3, Add.3/Corr.1 and Add.4.

[27] A/CN.4/488 and Add.1-3 and A/CN.4/483; A/CN.4/492 and A/CN.4/496; A/CN.4/504 and Add.1.

[28] Report of the Commission on the work of its fifty-second session, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 124-140.

[29] A/CN.4/515 and Corr.1 (Arabic only), Add.1-3.

[30] A/CN.4/517 and Add.1.

observations received from Governments. The Commission considered the report at its 2665th, 2667th, 2668th and 2670th to 2674th meetings, held on 23, 25 and 26 April and 1 to 4 and 8 May 2001. The debate focused primarily on the four main outstanding issues relating to the draft articles, namely: serious breaches of obligations to the international community as a whole (Part Two, chapter III); countermeasures (Part Two *bis*, chapter II); dispute settlement provisions (Part Three); and the form of the draft articles.

42. The Commission decided to refer the draft articles to the Drafting Committee, at its 2672nd and 2674th meetings, on 3 and 8 May 2001.

43. The Commission also decided, at its 2673rd meeting, on 4 May 2001, to establish two Working Groups on the topic: one open-ended Working Group to deal with the main outstanding issues on the topic, and the other Working Group to consider the commentaries to the draft articles.[31]

44. On the basis of the recommendation of the open-ended Working Group on the main outstanding issues, the Commission agreed as an exception to its long-standing practice in adopting draft articles on second reading to include a brief summary of the debate on the four issues in the light of the importance of the topic and the complexity of the issues. The recommendations of the open-ended Working Group on the main outstanding issues are contained in paragraphs 49, 55, 60 and 67 below.

1. Brief summary of the debate on the main outstanding issues

(a) Serious breaches of obligations to the international community as a whole (Part Two, chapter III contained in document A/CN.4/L.600*)

45. There were different views concerning the provisions on serious breaches in chapter III of Part Two and as was discussed in the fourth report of the Special Rapporteur.

46. Some members favoured retaining the chapter. In their view, it provided an essential balance to the text, having regard to the decision not to make reference to the concept of "international crimes of State" in former article 19 and was thus vital to the overall balance of the text. Moreover, it would be a retrograde step to delete the chapter, diminishing the work undertaken by the Commission and suggesting that the Commission was unable to find solutions to difficult and controversial issues.

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[31] For the composition of the Working Group on commentaries see chapter I, para. 8 above.

47. Many of those who favoured retaining the chapter felt, however, that it could be improved by various amendments. In particular, the notion of serious breaches required further clarification; the consequences of serious breaches needed to be defined more precisely and expanded to clarify, among other things, the right of all States to invoke the responsibility of a State arising from a serious breach (the so-called "*actio popularis*"); further indication of when a serious breach entailed exemplary or expressive damages needed to be given; in particular those damages needed to be identified more clearly so as to distinguish them from punitive damages, which were not available under general international law at present; the obligations of cooperation and non-recognition set forth in article 42, paragraph 2, needed to be clarified and developed; and it should be more clearly provided that these consequences were neither exhaustive nor mutually exclusive.

48. Other members favoured the deletion of the chapter for the following reasons: it dealt with primary rules; there was no basis in existing international law for a qualitative distinction between serious breaches and ordinary breaches, nor was such a distinction desirable as a matter of policy, having regard to the wide spectrum of violations that could occur; some of the elements of the provisions were highly problematic, such as the definition of serious breach, the notion of aggravated damages, the obligations incumbent on all States, and the countermeasures which all States were authorized to take. Instead of a separate chapter, the view was expressed that in order to avoid prejudicing the development of rules on "serious breaches", a "without prejudice" clause should be included in Part Four or elsewhere.

49. On the recommendation of the Open-ended Working Group, the Commission reached the understanding that the chapter would be retained but with the deletion of article 42, paragraph 1, which dealt with damages reflecting the gravity of the breach. As part of the understanding, the previous references to serious breach of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests, which mostly dealt with the question of invocation as expressed by the International Court of Justice in the *Barcelona Traction* case, would be replaced with the category of peremptory norms. Use of that category was to be preferred since it concerned the scope of secondary obligations and not their invocation. A further advantage of this approach was that the notion of peremptory norms was well established by now in the Vienna Convention on the Law of Treaties. The new formulation should not deal with trivial or minor breaches of peremptory norms, but only with serious

breaches of peremptory norms. The Drafting Committee was also asked to give further consideration to aspects of consequences of serious breaches in order to simplify these, to avoid excessively vague formulas and to narrow the scope of its application to cases falling properly within the scope of the chapter.

(b) Countermeasures (Part Two *bis*, chapter II contained in document A/CN.4/L.600*)

50. There were also different views concerning the provisions on countermeasures contained in chapter II of Part Two *bis* and as was discussed in the fourth report of the Special Rapporteur.

51. Some members favoured retaining this chapter for the following reasons: countermeasures undeniably existed and were recognized as part of international law, as the International Court of Justice had confirmed in the *Case concerning the Gabčikovo-Nagymaros Project*; unlike other circumstances precluding wrongfulness, countermeasures played a determining role in the implementation of responsibility since their purpose was to induce the wrongdoing State to comply with its obligation not only of cessation, but also of reparation; the regime of countermeasures set forth in articles 50 to 53 and 55 provided a strict framework for taking countermeasures to avoid abuse, provided clearer limits than the vague, indeterminate rules of customary international law governing countermeasures and represented a fragile balance whose essential structure should be maintained; and it would be illogical and impractical to include these provisions in article 23, given its different purpose and function and the length of the provisions to be added.

52. Some of the members favouring the retention of this chapter suggested various amendments which in their view would strike a balance between the right to take countermeasures and the need to curb their misuse. The suggestions included the strengthening of the reference to dispute settlement in article 53; and providing a flexible and expeditious dispute settlement machinery for resolving disputes concerning countermeasures.

53. Other members believed that this chapter should be deleted for the following reasons: the provisions were unnecessary and in significant respects did not reflect the state of the law or the logic of the role of countermeasures; the regime of countermeasures under customary law was only partly developed, and the chapter dealt with the modalities of a notion that was not clearly defined. Moreover the provisions were unsatisfactory in a number of respects: they failed to address the multiple purposes of countermeasures, they laid down procedural conditions

that were too strict and were inconsistent with international jurisprudence and arbitral decisions. It was suggested that the chapter's deletion could be accompanied by a strengthened and more comprehensive version of article 23, as proposed by several governments.

54. Independently of this general question concerning chapter II, there were different opinions regarding countermeasures by States other than the injured State, as provided for in article 54. Some members supported this provision as useful and necessary for dealing with serious breaches under article 41; as one of the essential consequences of serious breaches, without which States would be powerless to deal with such breaches and as crucial to the balance of the draft. In their view it was at least a legitimate form of progressive development of international law; indeed some aspects at least were supported by State practice. Other members opposed this provision for the following reasons: there was no existing foundation for article 54 as law or its potential progressive development because of the inconsistent practice and the absence of an *opinio juris*; and article 54 was flawed in several respects such as providing a superficial legitimacy for bullying small States, creating a "do-it-yourself" sanctions system which threatened the security system based on the United Nations Charter, and adding a new circumstance precluding wrongfulness for "collective" countermeasures which were not connected to "ordinary" countermeasures and might eventually extend to the use of force. It was suggested that article 54 be deleted and replaced by a saving clause.

55. On the recommendation of the open-ended Working Group, the Commission reached the understanding that it was undesirable to cram the whole or a substantial part of the articles on countermeasures into article 23, which was devoted only to one aspect of the question. Such an attempt would overburden article 23 and could even make it incomprehensible. As part of the understanding, article 23 would remain in chapter V of Part One. The chapter on countermeasures would remain in Part Three, but article 54, which dealt with countermeasures by States other than the injured State, would be deleted. Instead, there would be a saving clause leaving all positions on this issue unaffected. In addition, article 53 dealing with conditions relating to countermeasures, would be reconsidered and the distinction between countermeasures and provisional countermeasures would be deleted. That article was to be simplified and brought substantially into line with the decisions of the arbitral tribunal in the *Air Services* case and of the International Court of Justice in the *Gabčíkovo-Nagymaros* case. Articles 51 and 52 on the obligations not subject to countermeasures and proportionality were also to be reconsidered, as necessary.

(c) Dispute settlement provisions (Part Three)

56. The draft articles adopted on first reading included a Part Three dealing with dispute settlement.[32] There were different views regarding the dispute settlement provisions of that Part.

57. Some members favoured including general dispute settlement provisions, particularly if the Commission were to recommend the elaboration of a convention, because of the significance and complexity of the topic; the text dealt with many important questions of international law that were not covered by particular treaty rules; moreover the inclusion of provisions for dispute settlement would enhance the capacity of courts and tribunals to develop the law through their decisions. The view was also expressed that a compulsory dispute settlement mechanism was necessary at least in relation to countermeasures, given that these were liable to abuse.

58. Other members considered it unnecessary to include dispute settlement provisions. Provisions for dispute settlement were already sufficiently covered by a growing body of conventional international law, underlying which was the principle expressed in Article 33 of the Charter. In their view, given the close link between the primary obligations and the secondary obligations of State responsibility and the fact that the law of State responsibility was an integral part of the structure of international law as a whole, a special regime for dispute settlement in the framework of State responsibility might result in overlap with existing dispute settlement mechanisms and would lead to the fragmentation and proliferation of such mechanisms. Indeed general provision for compulsory dispute settlement in the field of State responsibility would amount to a reversal of the rule in Article 33 of the Charter, a move not to be expected and hardly realistic even now.

59. Still other members believed that the total absence of a dispute settlement mechanism would be inappropriate and suggested including a general dispute settlement provision similar to Article 33 of the Charter of the United Nations, as proposed by one government.

60. On the recommendation of the open-ended Working Group, the Commission reached the understanding that it would not include provisions for a dispute settlement machinery, but would draw attention to the machinery elaborated by the Commission in the first reading draft as a

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[32] For the texts of the *articles* on dispute settlement see the Report of the Commission on the work of its forty-eighth session, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), pp 147-151.

possible means for settlement of disputes concerning State responsibility; and would leave it to the General Assembly to consider whether and what form of provisions for dispute settlement could include in the event that the Assembly should decide to elaborate a convention.

(d) Form of the draft articles

61. As to the question of the eventual form of the draft articles to be proposed to the General Assembly, diverging views were expressed as to the advisability of the options available to it under article 23 of its Statute. Many members supported the conclusion of a convention, or the holding of a conference to conclude a convention. Others however preferred the option of the Assembly taking note of or adopting the report by resolution. A further option was for the Commission to recommend adoption of the draft articles in the form of a declaration, as had been proposed in 1999 in the context of the draft articles on nationality in relation to the succession of States.

62. Those members supporting the adoption of an international convention maintained, *inter alia*, that the Commission's task was to state the law, which could only be done through conventions; that the Commission had a tradition of having all of its major drafts adopted as international conventions; and that doing so in the case of the draft articles would ensure their place, together with the Vienna Convention on the Law of Treaties, as one of the fundamental pillars of public international law. Furthermore, in light of its significance, the obligations and rights peculiar to the institution of responsibility required a set of rules which could only be envisaged in a definitive binding instrument. Stating customary rules of international law in treaty form would give them additional certainty, reliability and binding force, and would thus consolidate a vital chapter of the law. In addition, not codifying the law of State responsibility in a treaty would create an imbalance in the international legal order whereby primary rules were more comprehensively codified than secondary rules. It was doubtful that non-ratification might lead to "reverse codification". The fact that customary rules were included in a convention did not per se mean that they would cease to enjoy such status if the convention were to remain unratified. Indeed, unratified conventions continued to play an important role. It was pointed out that all States participating in a diplomatic conference would be involved in the treaty's elaboration on an equal footing. The 1969 Vienna Convention had taken more than a decade to come into force, and was even now ratified by less than half the States in the world; neither of

these facts had had any discernible effect on its authority as a statement of the law of treaties. To say that States would necessarily upset the balance of the text implied that they acted against their own interests, when in fact, States, in principle, acted responsibly and were capable of engaging in political negotiations to produce satisfactory results even in the framework of a general codification. Furthermore, codification conferences had tended to make few changes to consensus texts prepared by the Commission.

63. Others, opposing the adoption of a convention, pointed out that: it was difficult to state the basic elements of international law in a convention; unlike for example the law of State immunity, the law of State responsibility did not require implementation in national legislation; moreover an unratified convention containing significant elements of customary international law could result in "reverse codification". It would, likewise, not be clear what the effects would be, both for parties and non-parties to the Convention. The possibility of reservations or of States adopting a non-cooperative stance posed further dangers. The Vienna Convention on the Law of Treaties was not an accurate analogy since it dealt largely with matters of form, whereas the topic of State responsibility covered the substance of international law and presupposed a disagreement or dispute between the parties concerned rather than a consensual activity such as treaty-making. Likewise, a convention was not strictly necessary since the draft articles adopted on second reading were bound to be influential, just as the existing text had been widely cited and relied on by the International Court and other tribunals. Furthermore, the holding of a conference of plenipotentiaries would result in a lengthy process, unpredictable in outcome, and could call into question the balance of the text, laboriously achieved over 40 years.

64. Some members supporting a non-treaty form maintained that while, under ideal conditions, a convention might be preferable, it was not realistic given all the difficulties which would inevitably arise. Furthermore, it would not be desirable to give the General Assembly a stark choice between "a convention or nothing". A General Assembly resolution or declaration adopted unanimously would be more effective than a convention adopted after many years of preparatory work and ratified by a small number of States. Indeed, if the Commission's report were adopted by resolution of the Assembly or taken note of, it would be seen as an authoritative study of current rules, State practice and doctrine aimed at providing guidance to States on their rights and responsibilities, thereby contributing to legal stability and predictability in

international relations. Adoption in the form of a declaration would effectively place the burden on opposing States to prove that it was not binding. It was observed that such "soft law" instruments did have a decisive impact on international relations and the conduct of States, as evidenced by the jurisprudence of the International Court of Justice.

65. Those opposing a non-binding instrument pointed out that such a route would detract from the importance of the question of State responsibility in international law, as well as casting doubts on the value of the text. A General Assembly resolution could not have the same normative value as a treaty. It would deviate from the original intention and objective, which called for a general system of legal rules, and would afford no way of remedying the inadequacies of international customary law. It would also fail to take account of the historical dimension of a project which had been on the Commission's agenda from the beginning. It would be unrealistic to expect the General Assembly to adopt the text as a declaration without first substantially amending the draft articles. There was no guarantee that States would not attach interpretative declarations to the instrument. Thus, a declaration entailed the same problems as a convention, but without the advantages.

66. As to the significance of the inclusion of elements of progressive development in the draft, on one view, the eventual form of the draft articles was dependent on their content: if a substantial lawmaking element was included, the appropriate form would be a multilateral convention, but if the draft articles merely codified existing rules, there would be no need for a convention. Others pointed out that precisely because the text contained elements of progressive development, caution was required and a convention should not be proposed. Practice showed that States were in general not in favour of such elements being included in internationally binding instruments. Still others disputed this, and pointed out that various conventions, such as those concerning the law of the sea and consular relations included aspects of codification and progressive development of international law. Like earlier Commission texts, the draft articles combined elements of both, it was not always possible to determine which category a particular provision belonged to, and in the long run this might not matter if a provision was seen to be sensible and balanced. In addition, substantial elements of international law had been articulated in conventions. For example, the Convention on the Law of Treaties includes the fundamental notion of peremptory norms.

67. On the recommendation of the open-ended Working Group, the Commission reached the understanding that in the first instance, it should recommend to the General Assembly that the Assembly should in a resolution take note of the draft articles and annex the text of the articles to the resolution. This is a procedure similar to the one that was followed by the Assembly with regard to the articles on "Nationality of natural persons in relation to the succession of States" in resolution 55/153. The recommendation would also propose that, given the importance of the topic, in the second and later stage the Assembly should consider the adoption of a Convention on this topic. The question of dispute settlement would naturally arise at that second stage (see para. 60 above).

2. Change of the title of the topic

68. The Commission was concerned that the title "State responsibility" was not sufficiently clear to distinguish the topic from the responsibility of the State under internal law. It considered different variants for the title, such as "State responsibility under international law", "International responsibility of States" and "International responsibility of States for internationally wrongful acts". One of the advantages of the last formulation was that it made it easier for the text to be translated into the other languages, by clearly distinguishing it from the concept of international "liability" for acts not prohibited by international law. At the end the Commission settled on the title "Responsibility of States for internationally wrongful acts", without the qualifier "international" before "responsibility" so as to avoid repeating the word "international" twice in the title. Since the draft articles cover only internationally wrongful acts and not any other wrongful acts, it was considered preferable to retain the reference to "international" before "wrongful acts".

3. Adoption of the draft articles and commentaries

69. The Chairman of the Drafting Committee presented his report (A/CN.4/L.602 and Corr.1 and subsequently as A/CN.4/602/Rev.1) at the 2681st to 2683rd and 2701st meetings of the Commission, held on 29 to 31 May and 3 August 2001. The Commission considered the report of the Drafting Committee at the same meetings and adopted the entire draft articles on Responsibility of States for internationally wrongful acts at its 2683rd and 2701st meetings.

70. At its 2702nd to 2709th meetings, held on 6 to 9 August 2001, the Commission adopted the commentaries to the aforementioned draft articles.

71. In accordance with its Statute, the Commission submits the draft articles to the General Assembly, together with the recommendation set out below.

C. Recommendation of the Commission

72. At its 2709th meeting, on 9 August 2001, The Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly that it take note of the draft articles on responsibility of States for internationally wrongful acts in a resolution, and that it annex the draft articles to the resolution.

73. The Commission decided further to recommend that the General Assembly consider, at a later stage, and in light of the importance of the topic, the possibility of convening an international conference of plenipotentiaries to examine the draft articles on responsibility of States for internationally wrongful acts with a view to concluding a convention on the topic. The Commission was of the view that the question of the settlement of disputes could be dealt with by the above-mentioned international conference, if it considered that a legal mechanism on the settlement of disputes should be provided in connection with the draft articles.

D. Tribute to the Special Rapporteur, Mr. James Crawford

74. At its 2709th meeting, on 9 August 2001, the Commission, after adopting the text of the draft articles on responsibility of States for internationally wrongful acts, adopted the following resolution by acclamation:

> "*The International Law Commission,*
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> *Having adopted* the draft articles on responsibility of States for internationally wrongful acts,
>
> *Expresses* to the Special Rapporteur, Mr. James Crawford, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft articles on responsibility of States for internationally wrongful acts."

75. The Commission also expressed its deep appreciation to the previous Special Rapporteurs, Messrs. Francisco V. Garcia-Amador, Roberto Ago, Willem Riphagen and Gaetano Arangio-Ruiz, for their outstanding contribution to the work of the topic.

E. Text of the draft articles on Responsibility of States for internationally wrongful acts

1. Text of the draft articles

76. The text of the draft articles adopted by the Commission at its fifty-third session are reproduced below.

RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I

General principles

Article 1

Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) Is attributable to the State under international law; and

(b) Constitutes a breach of an international obligation of the State.

Article 3

Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II

Attribution of conduct to a State

Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5

Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6

Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7

Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8

Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9

Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10

Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11

Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

CHAPTER III

Breach of an international obligation

Article 12

Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13

International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15

Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV

Responsibility of a State in connection with the act of another State

Article 16

Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Article 17

Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Article 18

Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(b) The coercing State does so with knowledge of the circumstances of the act.

Article 19

Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

CHAPTER V

Circumstances precluding wrongfulness

Article 20

Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21

Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22

Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.

Article 23

Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) The State has assumed the risk of that situation occurring.

Article 24

Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) The act in question is likely to create a comparable or greater peril.

Article 25

Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity.

Article 26

Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(b) The question of compensation for any material loss caused by the act in question.

PART TWO

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I

General principles

Article 28

Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

Article 29

Continued duty of performance

The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30

Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(a) To cease that act, if it is continuing;

(b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31

Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 32

Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Article 33

Scope of international obligations set out in this Part

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

CHAPTER II

Reparation for injury

Article 34

Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 35

Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) Is not materially impossible;

(b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36

Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37

Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 38

Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39

Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

CHAPTER III

Serious breaches of obligations under peremptory norms of general international law

Article 40

Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41

Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

PART THREE

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I

Invocation of the responsibility of a State

Article 42

Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(a) That State individually; or

(b) A group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) Specially affects that State; or

(ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 43

Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(a) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(b) What form reparation should take in accordance with the provisions of Part Two.

Article 44

Admissibility of claims

The responsibility of a State may not be invoked if:

(a) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45

Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(a) The injured State has validly waived the claim;

(b) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46

Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47

Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(a) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(b) Is without prejudice to any right of recourse against the other responsible States.

Article 48

Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

CHAPTER II

Countermeasures

Article 49

Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 50

Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) Obligations for the protection of fundamental human rights;

(c) Obligations of a humanitarian character prohibiting reprisals;

(d) Other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(a) Under any dispute settlement procedure applicable between it and the responsible State;

(b) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51

Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(a) Call on the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;

(b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(a) The internationally wrongful act has ceased; and

(b) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53

Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

Article 54

Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

PART FOUR

GENERAL PROVISIONS

Article 55

Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Article 56

Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Article 57

Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58

Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Article 59

Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

2. Text of the draft articles with commentaries thereto

77. The text of the draft articles with commentaries thereto adopted by the Commission at its fifty-third session, are reproduced below:

RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS

(1) These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive international law, customary and conventional.

(2) Roberto Ago, who was responsible for establishing the basic structure and orientation of the project, saw the articles as specifying …

> "the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may

> generate responsibility ... [I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation."[33]

(3) Given the existence of a primary rule establishing an obligation under international law for a State, and assuming that a question has arisen as to whether that State has complied with the obligation, a number of further issues of a general character arise. These include:

(*a*) The role of international law as distinct from the internal law of the State concerned in characterizing conduct as unlawful;

(*b*) Determining in what circumstances conduct is to be attributed to the State as a subject of international law;

(*c*) Specifying when and for what period of time there is or has been a breach of an international obligation by a State;

(*d*) Determining in what circumstances a State may be responsible for the conduct of another State which is incompatible with an international obligation of the latter;

(*e*) Defining the circumstances in which the wrongfulness of conduct under international law may be precluded;

(*f*) Specifying the content of State responsibility, i.e. the new legal relations that arise from the commission by a State of an internationally wrongful act, in terms of cessation of the wrongful act, and reparation for any injury done;

(*g*) Determining any procedural or substantive preconditions for one State to invoke the responsibility of another State, and the circumstances in which the right to invoke responsibility may be lost;

(*h*) Laying down the conditions under which a State may be entitled to respond to a breach of an international obligation by taking countermeasures designed to ensure the fulfilment of the obligations of the responsible State under these articles.

This is the province of the secondary rules of State responsibility.

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[33] *Yearbook ... 1970*, vol. II, p. 306, para. 66 (c).

(4) A number of matters do not fall within the scope of State responsibility as dealt with in the present articles:

First, as already noted, it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation. Nor do the articles deal with the question whether and for how long particular primary obligations are in force for a State. It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted. The same is true, *mutatis mutandis*, for other "sources" of international obligations, such as customary international law. The articles take the existence and content of the primary rules of international law as they are at the relevant time; they provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States.

Secondly, the consequences dealt with in the articles are those which flow from the commission of an internationally wrongful act as such.[34] No attempt is made to deal with the consequences of a breach for the continued validity or binding effect of the primary rule (e.g. the right of an injured State to terminate or suspend a treaty for material breach, as reflected in article 60 of the Vienna Convention on the Law of Treaties). Nor do the articles cover such indirect or additional consequences as may flow from the responses of international organizations to wrongful conduct. In carrying out their functions it may be necessary for international organizations to take a position on whether a State has breached an international obligation. But even where this is so, the consequences will be those determined by or within the framework of the constituent instrument of the organization, and these fall outside the scope of the articles. This is particularly the case with action of the United Nations under the Charter, which is specifically reserved by article 59.

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[34] For the purposes of the articles, the term "internationally wrongful act" includes an omission, and extends to conduct consisting of several actions or omissions which together amount to an internationally wrongful act. See commentary to article 1, para. (1).

Thirdly, the articles deal only with the responsibility for conduct which is internationally wrongful. There may be cases where States incur obligations to compensate for the injurious consequences of conduct which is not prohibited, and may even be expressly permitted, by international law (e.g. compensation for property duly taken for a public purpose). There may also be cases where a State is obliged to restore the *status quo ante* after some lawful activity has been completed. These requirements of compensation or restoration would involve primary obligations; it would be the failure to pay compensation, or to restore the status quo which would engage the international responsibility of the State concerned. Thus for the purposes of these articles, international responsibility results exclusively from a wrongful act contrary to international law. This is reflected in the title of the articles.

Fourthly, the articles are concerned only with the responsibility of States for internationally wrongful conduct, leaving to one side issues of the responsibility of international organizations or of other non-State entities (see articles 57, 58).

(5) On the other hand the present articles are concerned with the whole field of State responsibility. Thus they are not limited to breaches of obligations of a bilateral character, e.g. under a bilateral treaty with another State. They apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole. Being general in character, they are also for the most part residual. In principle States are free, when establishing or agreeing to be bound by a rule, to specify that its breach shall entail only particular consequences and thereby to exclude the ordinary rules of responsibility. This is made clear by article 55.

(6) The present articles are divided into four Parts. Part One is entitled "The Internationally Wrongful Act of a State". It deals with the requirements for the international responsibility of a State to arise. Part Two, "Content of the International Responsibility of a State", deals with the legal consequences for the responsible State of its internationally wrongful act, in particular as they concern cessation and reparation. Part Three is entitled "The Implementation of the International Responsibility of a State". It identifies the State or States which may react to an internationally wrongful act and specifies the modalities by which this may be done, including, in certain circumstances, by the taking of countermeasures as necessary to ensure cessation of the wrongful act and reparation for its consequences. Part Four contains certain general provisions applicable to the articles as a whole.

PART ONE

THE INTERNATIONALLY WRONGFUL ACT OF A STATE

Part One defines the general conditions necessary for State responsibility to arise. Chapter I lays down three basic principles for responsibility, from which the articles as a whole proceed. Chapter II defines the conditions under which conduct is attributable to the State. Chapter III spells out in general terms the conditions under which such conduct amounts to a breach of an international obligation of the State concerned. Chapter IV deals with certain exceptional cases where one State may be responsible for the conduct of another State not in conformity with an international obligation of the latter. Chapter V defines the circumstances precluding the wrongfulness for conduct not in conformity with the international obligations of a State.

Chapter I

General principles

Article 1

Responsibility of a State for its internationally wrongful acts

> Every internationally wrongful act of a State entails the international responsibility of that State.

Commentary

(1) Article 1 states the basic principle underlying the articles as a whole, which is that a breach of international law by a State entails its international responsibility. An internationally wrongful act of a State may consist in one or more actions or omissions or a combination of both. Whether there has been an internationally wrongful act depends, first, on the requirements of the obligation which is said to have been breached and, secondly, on the framework conditions for such an act, which are set out in Part One. The term “international responsibility” covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State. The content of these new legal relations is specified in Part Two.

(2) The Permanent Court of International Justice applied the principle set out in article 1 in a number of cases. For example in *Phosphates in Morocco*, the Permanent Court affirmed that when a State commits an internationally wrongful act against another State international

responsibility is established "immediately as between the two States".[35] The International Court of Justice has applied the principle on several occasions, for example in the *Corfu Channel* case,[36] in the *Military and Paramilitary Activities* case,[37] and in the *Gabčíkovo-Nagymaros Project* case.[38] The Court also referred to the principle in the advisory opinions on *Reparation for Injuries,*[39] and on the *Interpretation of Peace Treaties (Second Phase),*[40] in which it stated that "refusal to fulfil a treaty obligation involves international responsibility".[41] Arbitral tribunals have repeatedly affirmed the principle, for example in the *Claims of Italian Subjects Resident in Peru* cases,[42] in the *Dickson Car Wheel Company* case,[43] in the *International Fisheries Company* case,[44] in the *British Claims in the Spanish Zone of Morocco* case,[45] and in the

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[35] *Phosphates in Morocco, Preliminary Objections, 1938, P.C.I.J., Series A/B, No. 74,* p. 10, at p. 28. See also *S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1,* p. 15, at p. 30; *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9,* p. 21; *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17,* p. 29.

[36] *Corfu Channel, Merits, I.C.J. Reports 1949,* p. 4, at p. 23.

[37] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, I.C.J. Reports 1986,* p. 14, at pp. 142, para. 283, 149, para. 292.

[38] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997,* p. 7, at p. 38, para. 47.

[39] *Reparation for Injuries Suffered in the Service of the United Nations, I.C.J. Reports 1949,* p. 174, at p. 184.

[40] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, I.C.J. Reports 1950,* p. 221.

[41] Ibid., at p. 228.

[42] Seven of these awards, rendered in 1901, reiterated that "a universally recognized principle of international law states that the State is responsible for the violations of the law of nations committed by its agents ...": *UNRIAA.*, vol. XV, pp. 399, 401, 404, 407, 408, 409, 411 (1901).

[43] *UNRIAA*, vol. IV, p. 669, at p. 678 (1931).

[44] Ibid., vol. IV, p. 691, at p. 701 (1931).

[45] According to the arbitrator, Max Huber, it is an indisputable principle that "responsibility is the necessary corollary of rights. All international rights entail international responsibility ..."; *UNRIAA*, vol. II, p. 615 (1925), at p. 641.

Armstrong Cork Company case.[46] In the *Rainbow Warrior* case,[47] the Arbitral Tribunal stressed that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility".[48]

(3) That every internationally wrongful act of a State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place, has been widely recognized, both before[49] and since[50] article 1 was first formulated by the Commission. It is true that there were early differences of opinion over the definition of the legal relationships arising from an internationally wrongful act. One approach, associated with Anzilotti, described the legal consequences deriving from an internationally wrongful act exclusively in terms of a binding bilateral relationship thereby established between the wrongdoing State and the injured State, in which the obligation of the former State to make reparation is set against the "subjective" right of the latter State to require reparation. Another view, associated with Kelsen, started from the idea that the legal order is a coercive order and saw the authorization accorded to the injured State to apply a coercive sanction against the responsible State as the primary legal consequence flowing directly from the

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[46] According to the Italian-United States Conciliation Commission, no State may "escape the responsibility arising out of the exercise of an illicit action from the viewpoint of the general principles of international law": *UNRIAA*, vol. XIV, p. 159 (1953), at p. 163.

[47] *Rainbow Warrior (New Zealand/France), UNRIAA*, vol. XX, p. 217 (1990).

[48] Ibid., at p. 251, para. 75.

[49] See e.g. D. Anzilotti, *Corso di diritto internazionale* (4th edn.) Padua, CEDAM, (1955) vol. I, p. 385. W. Wengler, *Völkerrecht* (Berlin, Springer, 1964) vol. I, p. 499; G. I. Tunkin, *Teoria mezhdunarodnogo prava,* Mezhduranodnye othoshenia (Moscow, 1970), p. 470; E. Jiménez de Aréchaga, "International Responsibility", in M. Sørensen (ed.), *Manual of Public International Law* (London, Macmillan 1968), p. 533.

[50] See e.g. I. Brownlie, *Principles of Public International Law* (5th edn.) (Oxford, Clarendon Press, 1998), p. 435; B. Conforti, *Diritto Internazionale* (4th edn.) (Milan, Editoriale Scientifica, 1995), p. 332; P. Daillier & A. Pellet, *Droit international public (Nguyen Quoc Dinh)* (6th edn.) (Paris, L.G.D.J., 1999), p. 742; P-M. Dupuy, *Droit international public* (3rd edn.) (Paris, Précis Dalloz, 1998), p. 414; R. Wolfrum, "Internationally Wrongful Acts", in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam, North Holland, 1995), vol. II, p. 1398.

wrongful act.[51] According to this view, general international law empowered the injured State to react to a wrong; the obligation to make reparation was treated as subsidiary, a way by which the responsible State could avoid the application of coercion. A third view, which came to prevail, held that the consequences of an internationally wrongful act cannot be limited either to reparation or to a "sanction".[52] In international law, as in any system of law, the wrongful act may give rise to various types of legal relations, depending on the circumstances.

(4) Opinions have also differed on the question whether the legal relations arising from the occurrence of an internationally wrongful act were essentially bilateral, i.e., concerned only the relations of the responsible State and the injured State *inter se*. Increasingly it has been recognized that some wrongful acts engage the responsibility of the State concerned towards several or many States or even towards the international community as a whole. A significant step in this direction was taken by the International Court in the *Barcelona Traction* case when it noted that:

> "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[53]

Every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations. Among these the Court instanced "the outlawing of acts of aggression, and of genocide, as also … the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[54] In later cases the Court has reaffirmed this idea.[55] The consequences of a broader conception of international responsibility must necessarily be reflected in the articles which, although they include standard bilateral situations of responsibility, are not limited to them.

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[51] See H. Kelsen (R.W. Tucker, ed.), *Principles of International Law* (New York, Holt, Rhinehart & Winston, 1966), p. 22.

[52] See, e.g., R. Ago, "Le délit international", *Recueil des cours*, vol. 68, (1939/II), p. 417 at pp. 430-440; H. Lauterpacht, *Oppenheim's International Law* (8th edn.) (London, Longmans, 1955), vol. I, pp. 352-354.

[53] *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33.

[54] Ibid. at p. 32, para. 34.

(5) Thus the term "international responsibility" in article 1 covers the relations which arise under international law from the internationally wrongful act of a State, whether such relations are limited to the wrongdoing State and one injured State or whether they extend also to other States or indeed to other subjects of international law, and whether they are centred on obligations of restitution or compensation or also give the injured State the possibility of responding by way of countermeasures.

(6) The fact that under article 1 every internationally wrongful act of a State entails the international responsibility of that State does not mean that other States may not also be held responsible for the conduct in question, or for injury caused as a result. Under chapter II the same conduct may be attributable to several States at the same time. Under chapter IV, one State may be responsible for the internationally wrongful act of another, for example if the act was carried out under its direction and control. Nonetheless the basic principle of international law is that each State is responsible for its own conduct in respect of its own international obligations.

(7) The articles deal only with the responsibility of States. Of course, as the International Court of Justice affirmed in the *Reparation for Injuries* case, the United Nations "is a subject of international law and capable of possessing international rights and duties … it has the capacity to maintain its rights by bringing international claims".[56] The Court has also drawn attention to the responsibility of the United Nations for the conduct of its organs or agents.[57] It may be that

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[55] See *East Timor (Portugal* v. *Australia), I.C.J. Reports 1995*, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996*, p. 226, at p. 258, para. 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996*, p. 595, at pp. 615-616, paras. 31-32.

[56] *I.C.J. Reports 1949*, p. 174, at p. 179.

[57] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, I.C.J. Reports 1999*, p. 62, at pp. 88-89, para. 66.

the notion of responsibility for wrongful conduct is a basic element in the possession of international legal personality. Nonetheless special considerations apply to the responsibility of other international legal persons, and these are not covered in the articles.[58]

(8) As to terminology, the French term "fait internationalement illicite" is preferable to "délit" or other similar expressions which may have a special meaning in internal law. For the same reason, it is best to avoid, in English, such terms as "tort", "delict" or "delinquency", or in Spanish the term "delito". The French term "fait internationalement illicite" is better than "acte internationalement illicite", since wrongfulness often results from omissions which are hardly indicated by the term "acte". Moreover, the latter term appears to imply that the legal consequences are intended by its author. For the same reasons, the term "hecho internacionalmente ilícito" is adopted in the Spanish text. In the English text, it is necessary to maintain the expression "internationally wrongful act", since the French "fait" has no exact equivalent; nonetheless, the term "act" is intended to encompass omissions, and this is made clear in article 2.

Article 2

Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(*a*) Is attributable to the State under international law; and

(*b*) Constitutes a breach of an international obligation of the State.

Commentary

(1) Article 1 states the basic principle that every internationally wrongful act of a State entails its international responsibility. Article 2 specifies the conditions required to establish the existence of an internationally wrongful act of the State, i.e. the constituent elements of such an act. Two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time.

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[58] For the position of international organizations see article 57 and commentary.

(2) These two elements were specified, for example, by the Permanent Court of International Justice in the *Phosphates in Morocco* case.[59] The Court explicitly linked the creation of international responsibility with the existence of an "act being attributable to the State and described as contrary to the treaty right[s] of another State".[60] The International Court has also referred to the two elements on several occasions. In the *Diplomatic and Consular Staff* case,[61] it pointed out that, in order to establish the responsibility of Iran ...

> "[f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable."[62]

Similarly in the *Dickson Car Wheel Company* case, the Mexico-United States General Claims Commission noted that the condition required for a State to incur international responsibility is "that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard".[63]

(3) The element of attribution has sometimes been described as "subjective" and the element of breach as "objective", but the articles avoid such terminology.[64] Whether there has been a breach of a rule may depend on the intention or knowledge of relevant State organs or agents and in that sense may be "subjective". For example article II of the Genocide Convention states that: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such ...". In other cases, the standard for breach of an obligation may be "objective", in the sense that the

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[59] *Phosphates in Morocco, Preliminary Objections, 1938, P.C.I.J., Series A/B, No. 74*, p. 10.

[60] Ibid., at p. 28.

[61] *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3.

[62] Ibid., at p. 29, para. 56. Cf. p. 41, para. 90. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, I.C.J. Reports 1986*, p. 14, at pp. 117-118, para. 226; *Gabčikovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997*, p. 7, at p. 54, para. 78.

[63] *UNRIAA*, vol. IV, p. 669 (1931), at p. 678.

[64] Cf. *Yearbook ... 1973*, vol. II, p. 179, para. 1.

advertence or otherwise of relevant State organs or agents may be irrelevant. Whether responsibility is "objective" or "subjective" in this sense depends on the circumstances, including the content of the primary obligation in question. The articles lay down no general rule in that regard. The same is true of other standards, whether they involve some degree of fault, culpability, negligence or want of due diligence. Such standards vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation. Nor do the articles lay down any presumption in this regard as between the different possible standards. Establishing these is a matter for the interpretation and application of the primary rules engaged in the given case.

(4) Conduct attributable to the State can consist of actions or omissions. Cases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two. Moreover it may be difficult to isolate an "omission" from the surrounding circumstances which are relevant to the determination of responsibility. For example in the *Corfu Channel* case, the International Court of Justice held that it was a sufficient basis for Albanian responsibility that it knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third States of their presence.[65] In the *Diplomatic and Consular Staff* case, the Court concluded that the responsibility of Iran was entailed by the "inaction" of its authorities which "failed to take appropriate steps", in circumstances where such steps were evidently called for.[66] In other cases it may be the combination of an action and an omission which is the basis for responsibility.[67]

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[65] *Corfu Channel, Merits, I.C.J. Reports 1949,* p. 4, at pp. 22-23.

[66] *Diplomatic and Consular Staff, I.C.J. Reports 1980,* p. 3, at pp. 31-32, paras. 63, 67. See also *Velásquez Rodríguez, Inter-Am.Ct.H.R., Series C, No. 4* (1989), para. 170: "under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions ..."; *Affaire relative à l'acquisition de la nationalité polonaise, UNRIAA*, vol. I, p. 425 (1924).

[67] For example, under article 4 of the Hague Convention (VIII) of 18 October 1907 Relative to the Laying of Automatic Submarine Contact Mines, a neutral Power which lays mines off its coasts but omits to give the required notice to other States parties would be responsible accordingly: see J.B. Scott, *The Proceedings of the Hague Peace Conferences: The Conference of 1907* (New York, Oxford University Press, 1920), vol. I, p. 643.

(5) For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State. The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An "act of the State" must involve some action or omission by a human being or group: "States can act only by and through their agents and representatives."[68] The question is which persons should be considered as acting on behalf of the State, i.e. what constitutes an "act of the State" for the purposes of State responsibility.

(6) In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attribution of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State under one or other of the rules set out in chapter II.

(7) The second condition for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach of an international obligation of that State. The terminology of breach of an international obligation of the State is long established and is used to cover both treaty and non-treaty obligations. In its judgment on jurisdiction in the *Factory at Chorzów* case, the Permanent Court of International Justice used the words "breach of an engagement".[69] It employed the same expression in its subsequent judgment on the merits.[70] The International Court of Justice referred explicitly to these words in the *Reparation for Injuries* case.[71] The Arbitral Tribunal in the *Rainbow Warrior* affair, referred

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[68] *German Settlers in Poland, 1923, P.C.I.J., Series B, No. 6,* at p. 22.

[69] *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9,* p. 21.

[70] *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17,* p. 29.

[71] *Reparation for Injuries Suffered in the Service of the United Nations, I.C.J. Reports 1949,* p. 174, at p. 184.

to "any violation by a State of any obligation".[72] In practice, terms such as "non-execution of international obligations", "acts incompatible with international obligations", "violation of an international obligation" or "breach of an engagement" are also used.[73] All these formulations have essentially the same meaning. The phrase preferred in the articles is "breach of an international obligation" corresponding as it does to the language of article 36 (2) (c) of the Statute of the International Court.

(8) In international law the idea of breach of an obligation has often been equated with conduct contrary to the rights of others. The Permanent Court of International Justice spoke of an act "contrary to the treaty right[s] of another State" in its judgment in the *Phosphates in Morocco* case.[74] That case concerned a limited multilateral treaty which dealt with the mutual rights and duties of the parties, but some have considered the correlation of obligations and rights as a general feature of international law: there are no international obligations of a subject of international law which are not matched by an international right of another subject or subjects, or even of the totality of the other subjects (the international community as a whole). But different incidents may attach to a right which is held in common by all other subjects of international law, as compared with a specific right of a given State or States. Different States may be beneficiaries of an obligation in different ways, or may have different interests in respect of its performance. Multilateral obligations may thus differ from bilateral ones, in view of the diversity of legal rules and institutions and the wide variety of interests sought to be protected by them. But whether any obligation has been breached still raises the two basic questions identified in article 2, and this is so whatever the character or provenance of the obligation breached. It is a separate question who may invoke the responsibility arising from the breach of an obligation: this question is dealt with in Part Three.[75]

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[72] *Rainbow Warrior (New Zealand/France), UNRIAA*, vol. XX, p. 217 (1990), at p. 251, para. 75.

[73] At the 1930 League of Nations Codification Conference, the term "any failure ... to carry out the international obligations of the State" was adopted: *Yearbook ... 1956*, vol. II, p. 225.

[74] *Phosphates in Morocco, Preliminary Objections, 1938, P.C.I.J., Series A/B, No. 74*, p. 10, at p. 28.

[75] See also article 33 (2) and commentary.

(9) Thus there is no exception to the principle stated in article 2 that there are two necessary conditions for an internationally wrongful act - conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are also sufficient. It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, "damage" to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure. Whether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract.[76]

(10) A related question is whether fault constitutes a necessary element of the internationally wrongful act of a State. This is certainly not the case if by "fault" one understands the existence, for example, of an intention to harm. In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of a State that matters, independently of any intention.

(11) Article 2 introduces and places in the necessary legal context the questions dealt with in subsequent chapters of Part One. Subparagraph (a) - which states that conduct attributable to the State under international law is necessary for there to be an internationally wrongful act - corresponds to chapter II, while chapter IV deals with the specific cases where one State is responsible for the internationally wrongful act of another State. Subparagraph (b) - which states that such conduct must constitute a breach of an international obligation - corresponds to the general principles stated in chapter III, while chapter V deals with cases where the wrongfulness of conduct, which would otherwise be a breach of an obligation, is precluded.

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[76] For examples of analysis of different obligations, see e.g. *Diplomatic and Consular Staff, I.C.J. Reports 1980*, p. 3, at pp. 30-33, paras. 62-68; *Rainbow Warrior, UNRIAA*, vol. XX, p. 217 (1990), at pp. 266-267, paras. 107-110; WTO, Report of the Panel, *United States - Sections 301-310 of the Trade Act of 1974*, WTO doc. WT/DS152/R, 22 December 1999, paras. 7.41 ff.

(12) In subparagraph (a), the term "attribution" is used to denote the operation of attaching a given action or omission to a State. In international practice and judicial decisions, the term "imputation" is also used.[77] But the term "attribution" avoids any suggestion that the legal process of connecting conduct to the State is a fiction, or that the conduct in question is "really" that of someone else.

(13) In subparagraph (b), reference is made to the breach of an international obligation rather than a rule or a norm of international law. What matters for these purposes is not simply the existence of a rule but its application in the specific case to the responsible State. The term "obligation" is commonly used in international judicial decisions and practice and in the literature to cover all the possibilities. The reference to an "obligation" is limited to an obligation under international law, a matter further clarified in article 3.

Article 3

Characterization of an act of a State as internationally wrongful

> The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

Commentary

(1) Article 3 makes explicit a principle already implicit in article 2, namely that the characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned. There are two elements to this. First, an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State's own law. Secondly and most importantly, a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law. An act of a State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law - even if, under that law, the State was actually bound to act in that way.

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[77] See e.g., *Diplomatic and Consular Staff, I.C.J. Reports 1980,* p. 3, at p. 29, paras. 56, 58; *Military and Paramilitary Activities, I.C.J. Reports 1986,* p. 14, at p. 51, para. 86.

(2) As to the first of these elements, perhaps the clearest judicial decision is that of the Permanent Court in the *Treatment of Polish Nationals* case[78]. The Court denied the Polish Government the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the constitution of the Free City of Danzig, on the ground that:

> "... according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted … [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force … The application of the Danzig Constitution may … result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law … . However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City."[79]

(3) That conformity with the provisions of internal law in no way precludes conduct being characterized as internationally wrongful is equally well settled. International judicial decisions leave no doubt on that subject. In particular, the Permanent Court expressly recognized the principle in its first judgment, in the *S.S. Wimbledon.*[80] The Court rejected the argument of the German Government that the passage of the ship through the Kiel Canal would have constituted a violation of the German neutrality orders, observing that:

> "... a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace ... under article 380 of the Treaty of Versailles, it was [Germany's] definite duty to allow [the passage of the *Wimbledon* through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this article."[81]

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[78] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, 1932, P.C.I.J., Series A/B, No. 44,* p. 4.

[79] Ibid., at pp. 24-25. See also *"Lotus", 1927, P.C.I.J., Series A, No. 10,* at p. 24.

[80] *S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1.*

[81] Ibid., at pp. 29-30.

The principle was reaffirmed many times:

> "... it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."[82]
>
> "... it is certain that France cannot rely on her own legislation to limit the scope of her international obligations."[83]
>
> "... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."[84]

A different facet of the same principle was also affirmed in the Advisory Opinions on *Exchange of Greek and Turkish Populations*[85] and *Jurisdiction of the Courts of Danzig.*[86]

(4) The International Court has often referred to and applied the principle.[87] For example in the *Reparation for Injuries* case,[88] it noted that "[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible... the Member cannot

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[82] *Greco-Bulgarian "Communities", 1930, P.C.I.J., Series B, No. 17*, at p. 32.

[83] *Free Zones of Upper Savoy and the District of Gex, 1930, P.C.I.J., Series A, No. 24*, at p. 12; *Free Zones of Upper Savoy and the District of Gex, 1932, P.C.I.J., Series A/B, No. 46*, p. 96, at p. 167.

[84] *Treatment of Polish Nationals, 1932, P.C.I.J., Series A/B, No. 44*, p. 4, at p. 24.

[85] *Exchange of Greek and Turkish Populations, 1925, P.C.I.J., Series B, No. 10*, at p. 20.

[86] *Jurisdiction of the Courts of Danzig, 1928, P.C.I.J., Series B, No. 15*, at pp. 26-27. See also the observations of Lord Finlay in *Acquisition of Polish Nationality, 1923, P.C.I.J., Series B, No. 7*, at p. 26.

[87] See *Fisheries, I.C.J. Reports 1951*, p. 116, at p. 132; *Nottebohm, Preliminary Objection, I.C.J. Reports 1953*, p. 111, at p. 123; *Application of the Convention of 1902 Governing the Guardianship of Infants, I.C.J. Reports 1958*, p. 55, at p. 67; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, I.C.J. Reports 1988*, p. 12, at pp. 34-35, para. 57.

[88] *Reparation for Injuries Suffered in the Service of the United Nations, I.C.J. Reports 1949*, p. 174, at p. 180.

contend that this obligation is governed by municipal law". In the *ELSI* case,[89] a Chamber of the Court emphasized this rule, stating that:

> "Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty."[90]

Conversely, as the Chamber explained:

> "... the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness ... Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication."[91]

The principle has also been applied by numerous arbitral tribunals.[92]

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[89] *Elettronica Sicula S.p.A. (ELSI), I.C.J. Reports 1989*, p. 15.

[90] Ibid., at p. 51, para. 73.

[91] Ibid., at p. 74, para. 124.

[92] See e.g., the "*Alabama*" arbitration (1872), in Moore, *International Arbitrations* vol. IV, p. 4144, at pp. 4156, 4157; *Norwegian Shipowners' Claims (Norway/United States of America), UNRIAA*, vol. I, p. 309 (1922), at p. 331; *Tinoco* case *(United Kingdom/Costa Rica)*, ibid., vol. I, p. 371 (1923), at p. 386; *Shufeldt Claim*, ibid., vol. II, p. 1081 (1930), at p. 1098 ("... it is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter's subject."); *Wollemborg*, ibid., vol. XIV, p. 283 (1956), at p. 289; *Flegenheimer*, ibid., vol. XIV, p. 327 (1958), at p. 360.

(5) The principle was expressly endorsed in the work undertaken under the auspices of the League of Nations on the codification of State Responsibility,[93] as well as in the work undertaken under the auspices of the United Nations on the codification of the rights and duties of States and the law of treaties. The International Law Commission's Draft declaration on rights and duties of States, article 13, provided that:

> "Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."[94]

(6) Similarly this principle was endorsed in the Vienna Convention on the Law of Treaties, article 27 of which provides that:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."[95]

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[93] In point I of the request for information sent to States by the Preparatory Committee for the 1930 Conference on State Responsibility it was stated:

> "In particular, a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law."

In their replies, States agreed expressly or implicitly with this principle: League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (LN doc. C.75.M.69.1929.V.), p. 16. During the debate at the Conference, States expressed general approval of the idea embodied in point I and the Third Committee of the 1930 Hague Conference adopted article 5 to the effect that "A State cannot avoid international responsibility by invoking the state of its municipal law." (LN doc. C.351(c)M.145(c).1930.V; reproduced in *Yearbook ... 1956*, vol. II, p. 225).

[94] See G.A.Res. 375 (IV) of 6 December 1949. For the debate in the Commission, see *Yearbook ... 1949*, pp. 105-106, 150, 171. For the debate in the General Assembly see *G.A.O.R., Fourth Session, Sixth Committee*, 168th-173rd, 18-25 October 1949; 175th-183rd meetings, 27 October-3 November 1949; *G.A.O.R., Fourth Session, Plenary Meetings*, 270th meeting, 6 December 1949.

[95] Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331. Article 46 of the Vienna Convention provides for the invocation of provisions of internal law regarding competence to conclude treaties in limited circumstances, viz., where the violation of such provisions "was manifest and concerned a rule of ... internal law of fundamental importance".

(7) The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception fo cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals. It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.

(8) As regards the wording of the rule, the formulation "The municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law", which is similar to article 5 of the draft adopted on first reading at the Hague Conference of 1930 and also to article 27 of the Vienna Convention on the Law of Treaties, has the merit of making it clear that States cannot use their internal law as a means of escaping international responsibility. On the other hand, such a formulation sounds like a rule of procedure and is inappropriate for a statement of principle. Issues of the invocation of responsibility belong to Part Three, whereas this principle addresses the underlying question of the origin of responsibility. In addition, there are many cases where issues of internal law are relevant to the existence or otherwise of responsibility. As already noted, in such cases it is international law which determines the scope and limits of any reference to internal law. This element is best reflected by saying, first, that the characterization of State conduct as internationally wrongful is governed by international law, and secondly by affirming that conduct which is characterized as wrongful under international law cannot be excused by reference to the legality of that conduct under internal law.

(9) As to terminology, in the English version the term "internal law" is preferred to "municipal law", because the latter is sometimes used in a narrower sense, and because the Vienna Convention on the Law of Treaties speaks of "internal law". Still less would it be appropriate to use the term "national law", which in some legal systems refers only to the laws emanating from the central legislature, as distinct from provincial, cantonal or local authorities.

The principle in article 3 applies to all laws and regulations adopted within the framework of the State, by whatever authority and at whatever level.[96] In the French version the expression "droit interne" is preferred to "législation interne" and "loi interne", because it covers all provisions of the internal legal order, whether written or unwritten and whether they take the form of constitutional or legislative rules, administrative decrees or judicial decisions.

Chapter II

Attribution of conduct to a State

(1) In accordance with article 2, one of the essential conditions for the international responsibility of a State is that the conduct in question is attributable to the State under international law. Chapter II defines the circumstances in which such attribution is justified, i.e. when conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State.

(2) In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State.[97]

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[96] Cf. *LaGrand, (Germany v. United States of America), Provisional Measures, I.C.J. Reports 1999,* p. 9, at p. 16, para. 28.

[97] See e.g., I. Brownlie, *System of the Law of Nations: State Responsibility, (Part I)* (Oxford, Clarendon Press, 1983), pp. 132-166; D.D. Caron, "The Basis of Responsibility: Attribution and Other Trans-Substantive Rules", in R. Lillich & D. Magraw (eds.), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Irvington-on-Hudson, Transnational Publishers, 1998), p. 109; L. Condorelli, "L'imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances", *Recueil des cours* ..., vol. 189 (1984-VI), p. 9; H. Dipla, *La responsabilité de l'Etat pour violation des droits de l'homme - problèmes d'imputation* (Paris, Pedone, 1994); A.V. Freeman, "Responsibility of States for Unlawful Acts of Their Armed Forces", *Recueil des cours* ..., vol. 88 (1956), p. 261; F. Przetacznik, "The International Responsibility of States for the Unauthorized Acts of their Organs", *Sri Lanka Journal of International Law*, vol. 1 (1989), p. 151.

(3) As a corollary, the conduct of private persons is not as such attributable to the State. This was established, for example, in the *Tellini* case of 1923. The Council of the League of Nations referred to a special Committee of Jurists certain questions arising from an incident between Italy and Greece.[98] This involved the assassination on Greek territory of the Chairman and several members of an international commission entrusted with the task of delimiting the Greek-Albanian border. In reply to question five, the Committee stated that:

> "The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal."[99]

(4) The attribution of conduct to the State as a subject of international law is based on criteria determined by international law and not on the mere recognition of a link of factual causality. As a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful. Its concern is to establish that there is an act of the State for the purposes of responsibility. To show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct, and rules of attribution should not be formulated in terms which imply otherwise. But the different rules of attribution stated in chapter II have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects. For example a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.[100] In this respect there is often a close link between the basis of attribution and the particular obligation said to have been breached, even though the two elements are analytically distinct.

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[98] League of Nations, *Official Journal*, 4th Year, No. 11 (November 1923), p. 1349.

[99] League of Nations, *Official Journal*, 5th Year, No. 4 (April 1924), p. 524. See also the *Janes* case, *UNRIAA*, vol. IV, p. 82 (1925).

[100] See *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3.

(5) The question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State. Thus the head of State or government or the minister of foreign affairs is regarded as having authority to represent the State without any need to produce full powers.[101] Such rules have nothing to do with attribution for the purposes of State responsibility. In principle, the State's responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level of administration or government at which the conduct occurs.[102] Thus the rules concerning attribution set out in this chapter are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its government.

(6) In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government. But while the State remains free to determine its internal structure and functions through its own law and practice, international law has a distinct role. For example, the conduct of certain institutions performing public functions and exercising public powers (e.g. the police) is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government.[103] Conduct engaged in by organs of the State in excess of their competence may also be attributed to the State under international law, whatever the position may be under internal law.[104]

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[101] See arts. 7, 8, 46, 47, Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

[102] The point was emphasized, in the context of federal States, in *LaGrand (Germany v. United States of America), Provisional Measures, I.C.J. Reports 1999*, p. 9, at p. 16, para. 28. It is not of course limited to federal States. See further article 5 and commentary.

[103] See commentary to article 4, para. (11); see also article 5 and commentary.

[104] See article 7 and commentary.

(7) The purpose of this chapter is to specify the conditions under which conduct is attributed to the State as a subject of international law for the purposes of determining its international responsibility. Conduct is thereby attributed to the State as a subject of international law and not as a subject of internal law. In internal law, it is common for the "State" to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or corporations may have separate legal personality under internal law, with separate accounts and separate liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law.

(8) Chapter II consists of eight articles. Article 4 states the basic rule attributing to the State the conduct of its organs. Article 5 deals with conduct of entities empowered to exercise the governmental authority of a State, and article 6 deals with the special case where an organ of one State is placed at the disposal of another State and empowered to exercise the governmental authority of that State. Article 7 makes it clear that the conduct of organs or entities empowered to exercise governmental authority is attributable to the State even if it was carried out outside the authority of the organ or person concerned or contrary to instructions. Articles 8-11 then deal with certain additional cases where conduct, not that of a State organ or entity, is nonetheless attributed to the State in international law. Article 8 deals with conduct carried out on the instructions of a State organ or under its direction or control. Article 9 deals with certain conduct involving elements of governmental authority, carried out in the absence of the official authorities. Article 10 concerns the special case of responsibility in defined circumstances for the conduct of insurrectional movements. Article 11 deals with conduct not attributable to the State under one of the earlier articles which is nonetheless adopted by the State, expressly or by conduct, as its own.

(9) These rules are cumulative but they are also limitative. In the absence of a specific undertaking or guarantee (which would be a *lex specialis*[105]), a State is not responsible for the conduct of persons or entities in circumstances not covered by this chapter. As the

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[105] See article 55 and commentary.

Iran-United States Claims Tribunal has affirmed, "in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State".[106] This follows already from the provisions of article 2.

Article 4

Conduct of organs of a State

> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Commentary

(1) Paragraph 1 of article 4 states the first principle of attribution for the purposes of State responsibility in international law - that the conduct of an organ of the State is attributable to that State. The reference to a "State organ" covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State: this is made clear by the final phrase.

(2) Certain acts of individuals or entities which do not have the status of organs of the State may be attributed to the State in international law, and these cases are dealt with in later articles of this chapter. But the rule is nonetheless a point of departure. It defines the core cases of attribution, and it is a starting point for other cases. For example, under article 8 conduct which is authorized by the State, so as to be attributable to it, must have been authorized by an organ of the State, either directly or indirectly.

(3) That the State is responsible for the conduct of its own organs, acting in that capacity, has long been recognized in international judicial decisions. In the *Moses* case, for example, a decision of a Mexico-United States Mixed Claims Commission, Umpire Lieber said: "An

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[106] *Yeager v. Islamic Republic of Iran* (1987) 17 *Iran-U.S.C.T.R.* 92, at pp. 101-2.

officer or person in authority represents *pro tanto* his government, which in an international sense is the aggregate of all officers and men in authority".[107] There have been many statements of the principle since then.[108]

(4) The replies by Governments to the Preparatory Committee for the 1930 Conference for the Codification of International Law[109] were unanimously of the view that the actions or omissions of organs of the State must be attributed to it. The Third Committee of the Conference adopted unanimously on first reading an article 1, which provided that international responsibility shall be incurred by a State as a consequence of "any failure on the part of its organs to carry out the international obligations of the State ..."[110]

(5) The principle of the unity of the State entails that the acts or omissions of all its organs should be regarded as acts or omissions of the State for the purposes of international responsibility. It goes without saying that there is no category of organs specially designated for the commission of internationally wrongful acts, and virtually any State organ may be the author of such an act. The diversity of international obligations does not permit any general distinction between organs which can commit internationally wrongful acts and those which cannot. This is reflected in the closing words of paragraph 1, which clearly reflect the rule of international law in the matter.

(6) Thus the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of

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[107] Moore, *International Arbitrations*, vol. III, p. 3127 (1871), at p. 3129.

[108] See e.g. *Claims of Italian Nationals Resident in Peru*, *UNRIAA*, vol. XV, p. 399 (1901) (*Chiessa* claim); p. 401 (*Sessarego* claim); p. 404 (*Sanguinetti* claim); p. 407 (*Vercelli* claim); p. 408 (*Queirolo* claim); p. 409 (*Roggero* claim); p. 411 (*Miglia* claim); *Salvador Commercial Company*, *ibid.*, vol. XV, p. 455 (1902), at p. 477; *Finnish Shipowners (Great Britain/Finland)*, *UNRIAA*, vol. III, p. 1479 (1934), at p. 1501.

[109] League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (Doc. C.75.M.69.1929.V.), pp. 25, 41, 52; *Supplement to Volume III: Replies made by the Governments to the Schedule of Points; Replies of Canada and the United States of America* (Doc C.75(a)M.69(a).1929.V.), pp. 2-3, 6.

[110] Reproduced in *Yearbook ... 1956*, vol. II, p. 225, Annex 3.

whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs. Thus, in the *Salvador Commercial Company* case, the Tribunal said that:

> "... a State is responsible for the acts of its rulers, whether they belong to the legislative, executive, or judicial department of the Government, so far as the acts are done in their official capacity."[111]

The International Court has also confirmed the rule in categorical terms. In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, it said:

> "According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule… is of a customary character…"[112]

In that case the Court was principally concerned with decisions of State courts, but the same principle applies to legislative and executive acts.[113] As the Permanent Court said in *Certain German Interests in Polish Upper Silesia (Merits)* …

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[111] *UNRIAA*, vol. XV, p. 455 (1902), at p. 477. See also *Chattin* case, *UNRIAA*, vol. IV, p. 282 (1927), at p. 285-86; *Dispute concerning the interpretation of article 79 of the Treaty of Peace*, *UNRIAA*, vol. XIII, p. 389 (1955), at p. 438.

[112] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, I.C.J. Reports 1999*, p. 62, at p. 87, para. 62, referring to the Draft Articles on State Responsibility, art. 6, now embodied in art. 4.

[113] As to legislative acts see e.g. *German Settlers in Poland, 1923, P.C.I.J., Series B, No. 6,* at p. 35-36; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, 1932, P.C.I.J., Series A/B, No. 44,* p. 4, at pp. 24-25; *Phosphates in Morocco, Preliminary Objections, 1938, P.C.I.J., Series A/B, No. 74,* p. 10, at pp. 25-26; *Rights of Nationals of the United States of America in Morocco, I.C.J. Reports 1952*, p. 176, at pp. 193-194. As to executive acts see e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986,* p. 14; *Elettronica Sicula S.p.A. (ELSI), I.C.J. Reports 1989,* p. 15. As to judicial acts see e.g. *"Lotus", 1927, P.C.I.J., Series A, No. 10*, at p. 24; *Jurisdiction of the Courts of Danzig, 1928, P.C.I.J., Series B, No. 15*, at p. 24; *Ambatielos, Merits, I.C.J. Reports 1953,* p. 10, at pp. 21-22. In some cases, the conduct in question may involve both executive and judicial acts; see e.g. *Application of the Convention of 1902 Governing the Guardianship of Infants, I.C.J. Reports 1958*, p. 55, at p. 65.

> "From the standpoint of International Law and of the Court which is its organ, municipal laws ... express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures."[114]

Thus article 4 covers organs, whether they exercise "legislative, executive, judicial or any other functions". This language allows for the fact that the principle of the separation of powers is not followed in any uniform way, and that many organs exercise some combination of public powers of a legislative, executive or judicial character. Moreover the term is one of extension, not limitation, as is made clear by the words "or any other functions".[115] It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as "*acta iure gestionis*". Of course the breach by a State of a contract does not as such entail a breach of international law.[116] Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4,[117] and it might in certain circumstances amount to an internationally wrongful act.[118]

(7) Nor is any distinction made at the level of principle between the acts of "superior" and "subordinate" officials, provided they are acting in their official capacity. This is expressed in the phrase "whatever position it holds in the organization of the State" in article 4. No doubt

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[114] *Certain German Interests in Polish Upper Silesia, Merits, 1926, P.C.I.J., Series A, No. 7,* at p. 19.

[115] These functions might involve, e.g., the giving of administrative guidance to the private sector. Whether such guidance involves a breach of an international obligation may be an issue, but as "guidance" it is clearly attributable to the State. See, e.g., G.A.T.T., *Japan - Trade in Semi-conductors*, Panel Report of 24 March 1988, paras. 110-111; WTO, *Japan - Measures affecting Consumer Photographic Film and Paper*, Panel Report WT/DS44, paras. 10.12-10.16.

[116] See article 3 and commentary.

[117] See e.g. the decisions of the European Court of Human Rights in the *Swedish Engine Drivers' Union Case, E.C.H.R., Series A, No. 20* (1976), at p. 14; and *Schmidt and Dahlström, E.C.H.R., Series A, No. 21* (1976), at p. 15.

[118] The irrelevance of the classification of the acts of State organs as *iure imperii* or *iure gestionis* was affirmed by all those members of the Sixth Committee who responded to a specific question on this issue from the Commission: see *Report of the I.L.C ... 1998* (A/53/10), para. 35.

lower level officials may have a more restricted scope of activity and they may not be able to make final decisions. But conduct carried out by them in their official capacity is nonetheless attributable to the State for the purposes of article 4. Mixed commissions after the Second World War often had to consider the conduct of minor organs of the State, such as administrators of enemy property, mayors and police officers, and consistently treated the acts of such persons as attributable to the State.[119]

(8) Likewise, the principle in article 4 applies equally to organs of the central government and to those of regional or local units. This principle has long been recognized. For example the Franco-Italian Conciliation Commission in the *Heirs of the Duc de Guise* case said:

> "For the purposes of reaching a decision in the present case it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian Republic."[120]

This principle was strongly supported during the preparatory work for the Conference for the Codification of International Law of 1930. Governments were expressly asked whether the State became responsible as a result of "[a]cts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, etc.)". All answered in the affirmative.[121]

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[119] See, e.g., the *Currie* case, *UNRIAA,* vol. XIV, p. 21 (1954), at p. 24; *Dispute concerning the interpretation of article 79 of the Italian Peace Treaty*, *UNRIAA*, vol. XIII, p. 389 (1955), at pp. 431-432; *Mossé* case, *ibid.*, vol. XIII, p. 486 (1953), at pp. 492-493. For earlier decisions see the *Roper* case, *UNRIAA,* vol. IV, p. 145 (1927); *Massey*, *ibid.*, vol. IV, p. 155 (1927); *Way*, *ibid.*, vol. IV, p. 391 (1928), at p. 400; *Baldwin*, *UNRIAA,* vol. VI, p. 328 (1933). Cf. also the consideration of the requisition of a plant by the Mayor of Palermo in *Elettronica Sicula S.p.A. (ELSI), I.C.J. Reports 1989,* p. 15, e.g. at p. 50, para. 70.

[120] *UNRIAA,* vol. XIII, p. 150 (1951), at p. 161. For earlier decisions, see e.g. the *Pieri Dominique and Co.* case, *UNRIAA,* vol. X, p. 139 (1905), at 156.

[121] League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (Doc. C.75.M.69.1929.V.), p. 90; *Supplement to Vol. III*: *Replies made by the Governments to the Schedule of Points: Replies of Canada and the United States of America* (Doc. C.75(a).M.69(a). 1929.V.), pp. 3, 18.

(9) It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations. The award in the *Montijo* case is the starting point for a consistent series of decisions to this effect.[122] The France/Mexico Claims Commission in the *Pellat* case reaffirmed "the principle of the international responsibility ... of a federal State for all the acts of its separate States which give rise to claims by foreign States" and noted specially that such responsibility "...cannot be denied, not even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law".[123] That rule has since been consistently applied. Thus for example in the *LaGrand* case, the International Court said:

> "Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be; whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings; whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona; whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor; whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States..."[124]

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[122] See Moore, *International Arbitrations*, vol. II, p. 1421 (1875), at p. 1440. See also *De Brissot and others*, Moore, *International Arbitrations*, vol. III, pp. 2967 (1855), at pp. 2970-2971; *Pieri Dominique and Co.*, *UNRIAA*, vol. X, p. 139 (1905), at pp. 156-157; *Davy* case, *UNRIAA*, vol. IX, p. 467 (1903), at p. 468; *Janes* case, *UNRIAA*, vol. IV, p. 82 (1925), at p. 86; *Swinney*, *ibid.* vol. IV, p. 98 (1925), at p. 101; *Quintanilla*, *ibid.*, vol. IV, p. 101 (1925), at p. 103, *Youmans*, *ibid.*, vol. IV, p. 110 (1925), at p. 116; *Mallén*, *ibid.*, vol. IV, p. 173 (1925), at p. 177; *Venable*, *ibid.*, vol. IV, p. 218 (1925), at p. 230; *Tribolet*, *ibid.*, vol. IV, p. 598 (1925), at p. 601.

[123] *UNRIAA*, vol. V, p. 534 (1929), at p. 536.

[124] *LaGrand (Germany v. United States of America), Provisional Measures, I.C.J. Reports 1999*, p. 9, at p. 16, para. 28. See also the judgment of 27 June 2001, para. 81.

(10) The reasons for this position are reinforced by the fact that federal States vary widely in their structure and distribution of powers, and that in most cases the constituent units have no separate international legal personality of their own (however limited), nor any treaty-making power. In those cases where the constituent unit of a federation is able to enter into international agreements on its own account,[125] the other party may well have agreed to limit itself to recourse against the constituent unit in the event of a breach. In that case the matter will not involve the responsibility of the federal State and will fall outside the scope of the present articles. Another possibility is that the responsibility of the federal State under a treaty may be limited by the terms of a federal clause in the treaty.[126] This is clearly an exception to the general rule, applicable solely in relations between the States parties to the treaty and in the matters which the treaty covers. It has effect by virtue of the *lex specialis* principle, dealt with in article 55.

(11) Paragraph 2 explains the relevance of internal law in determining the status of a State organ. Where the law of a State characterizes an entity as an organ, no difficulty will arise. On the other hand, it is not sufficient to refer to internal law for the status of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading. The internal law of a State may not classify, exhaustively or at all, which entities have the status of "organs". In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an "organ", internal law will not itself perform the task of classification. Even if it does so, the term "organ" used in internal law may have a special meaning, and not the very broad meaning it has under article 4. For example, under some legal systems the term "government" refers only to bodies at the highest level such as the head of State and the cabinet of ministers. In others, the police have a special status, independent of the executive; this cannot mean that for international law purposes they are not organs of the

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[125] See e.g. arts. 56 (3), 172 (3) of the Constitution of the Swiss Confederation, 18 April 1999.

[126] See e.g. Convention for the Protection of the World Cultural and Natural Heritage, Paris, United Nations, *Treaty Series*, vol. 1037, p. 151, art. 34.

State.[127] Accordingly, a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word "includes" in paragraph 2.

(12) The term "person or entity" is used in article 4, paragraph 2, as well as in articles 5 and 7. It is used to include in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority, etc. The term "entity" is used in a similar sense in the draft articles on Jurisdictional immunities of States and their property, adopted in 1991.[128]

(13) Although the principle stated in article 4 is clear and undoubted, difficulties can arise in its application. A particular problem is to determine whether a person who is a State organ acts in that capacity. It is irrelevant for this purpose that the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State. The distinction between unauthorized conduct of a State organ and purely private conduct has been clearly drawn in international arbitral decisions. For example, the award of the United States/Mexico General Claims Commission in the *Mallén* case (1927) involved, first, the act of an official acting in a private capacity, and secondly, another act committed by the same official in his official capacity, although in an abusive way.[129] The latter action was, and the former was not, held attributable to the State. The French-Mexican Claims Commission in the *Caire* case excluded responsibility only in cases where "the act had no connexion with the official function and was, in fact, merely the act of a private individual".[130] The case of purely private conduct should not be confused with that of an organ functioning as such but acting *ultra*

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[127] See e.g. the *Church of Scientology* case in the German Bundesgerichtshof, Judgment of 26 September 1978, *VI ZR 267/76, N.J.W.* 1979, p. 1101; *I.L.R.*, vol. 65, p. 193; *Propend Finance Pty. Ltd. v. Sing,* (1997) *I.L.R.*, vol. 111, p. 611 (C.A., England). These were State immunity cases, but the same principle applies in the field of State responsibility.

[128] *Yearbook... 1991*, vol. II Part Two, pp. 14-18.

[129] *UNRIAA*, vol. IV, p. 173 (1927), at p. 175.

[130] *UNRIAA*, vol. V, p. 516 (1929), at p. 531. See also the *Bensley* case (1850), in Moore, *International Arbitrations*, vol. III, p. 3018 ("a wanton trespass... under no color of official proceedings, and without any connexion with his official duties"); *Castelains,* Moore, *International Arbitrations*, vol. III, pp. 2999 (1880). See further article 7 and commentary.

vires or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State: this principle is affirmed in article 7.[131] In applying this test, of course, each case will have to be dealt with on the basis of its own facts and circumstances.

Article 5

Conduct of persons or entities exercising elements of governmental authority

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Commentary

(1) Article 5 deals with the attribution to the State of conduct of bodies which are not State organs in the sense of article 4, but which are nonetheless authorized to exercise governmental authority. The article is intended to take account of the increasingly common phenomenon of para-statal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.

(2) The generic term "entity" reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or State-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine. In one case before the Iran-United States Claims Tribunal, an autonomous foundation established by the

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[131] See further commentary to article 7, paragraph (7).

State held property for charitable purposes under close governmental control; its powers included the identification of property for seizure. It was held that it was a public and not a private entity, and therefore within the Tribunal's jurisdiction; with respect to its administration of allegedly expropriated property, it would in any event have been covered by article 5.[132]

(3) The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control - these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.

(4) Para-statal entities may be considered a relatively modern phenomenon, but the principle embodied in article 5 has been recognized for some time. For example the replies to the request for information made by the Preparatory Committee for the 1930 Codification Conference indicated strong support from some governments for the attribution to the State of the conduct of autonomous bodies exercising public functions of an administrative or legislative character. The German Government, for example, asserted that:

> "when, by delegation of powers, bodies act in a public capacity, e.g., police an area … the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies".[133]

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[132] *Hyatt International Corporation v. Government of the Islamic Republic of Iran* (1985) 9 *Iran-U.S.C.T.R.* 72, at pp. 88-94.

[133] League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee*, Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (Doc. C.75.M.69.1929.V.), p. 90. The German Government noted that these remarks would extend to the situation where "the State, as an exceptional measure, invests private organizations with public powers and duties or authorities [sic] them to exercise sovereign rights, as in the case of private railway companies permitted to maintain a police force"; *ibid.*

The Preparatory Committee accordingly prepared the following Basis of Discussion, though the Third Committee of the Conference was unable in the time available to examine it:

> "A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such … autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State".[134]

(5) The justification for attributing to the State under international law the conduct of "para-statal" entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling-stock).

(6) Article 5 does not attempt to identify precisely the scope of "governmental authority" for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.

(7) The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority. This is to be distinguished from situations where an entity acts under the direction or control of the State, which are covered by article 8, and those where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 9. For the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State. On the other hand article 5 does not extend to cover,

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[134] *Ibid.*, p. 92.

for example, situations where internal law authorizes or justifies certain conduct by way of self-help or self-defence; i.e. where it confers powers upon or authorizes conduct by citizens or residents generally. The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category.

Article 6

Conduct of organs placed at the disposal of a State by another State

> The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Commentary

(1) Article 6 deals with the limited and precise situation in which an organ of a State is effectively put at the disposal of another State so that the organ may temporarily act for its benefit and under its authority. In such a case, the organ, originally that of one State, acts exclusively for the purposes of and on behalf of another State and its conduct is attributed to the latter State alone.

(2) The words "placed at the disposal of" in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving and not of the sending State. The notion of an organ "placed at the disposal of" the receiving State is a specialized one, implying that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed. In performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State. Thus article 6 is not concerned with ordinary situations of interstate cooperation or collaboration, pursuant to treaty or otherwise.[135]

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[135] Thus conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to Albania: *Xhavara & others v. Italy & Albania*, Application Nos. 39473-98, E.C.H.R., decision of 11 January 2001. Conversely conduct of Turkey taken in the context of the E.C.-Turkey customs union was still attributable to Turkey: see WTO, *Turkey - Restrictions on Imports of Textile and Clothing Products*, Panel Report, WT/DS34/R, 31 May 1999, paras. 9.33-9.44.

(3) Examples of situations that could come within this limited notion of a State organ "placed at the disposal" of another State might include a section of the health service or some other unit placed under the orders of another country to assist in overcoming an epidemic or natural disaster, or judges appointed in particular cases to act as judicial organs of another State. On the other hand, mere aid or assistance offered by organs of one State to another on the territory of the latter is not covered by article 6. For example armed forces may be sent to assist another State in the exercise of the right of collective self-defence or for other purposes. Where the forces in question remain under the authority of the sending State, they exercise elements of the governmental authority of that State and not of the receiving State. Situations can also arise where the organ of one State acts on the joint instructions of its own and another State, or there may be a single entity which is a joint organ of several States. In these cases, the conduct in question is attributable to both States under other articles of this chapter.[136]

(4) Thus what is crucial for the purposes of article 6 is the establishment of a functional link between the organ in question and the structure or authority of the receiving State. The notion of an organ "placed at the disposal" of another State excludes the case of State organs, sent to another State for the purposes of the former State or even for shared purposes, which retain their own autonomy and status: for example, cultural missions, diplomatic or consular missions, foreign relief or aid organizations. Also excluded from the ambit of article 6 are situations in which functions of the "beneficiary" State are performed without its consent, as when a State placed in a position of dependence, territorial occupation or the like is compelled to allow the acts of its own organs to be set aside and replaced to a greater or lesser extent by those of the other State.[137]

(5) There are two further criteria that must be met for article 6 to apply. First, the organ in question must possess the status of an organ of the sending State; and secondly its conduct must involve the exercise of elements of the governmental authority of the receiving State. The first

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[136] See also article 47 and commentary.

[137] For the responsibility of a State for directing, controlling or coercing the internationally wrongful act of another see articles 17 and 18 and commentaries.

of these conditions excludes from the ambit of article 6 the conduct of private entities or individuals which have never had the status of an organ of the sending State. For example, experts or advisors placed at the disposal of a State under technical assistance programs usually do not have the status of organs of the sending State. The second condition is that the organ placed at the disposal of a State by another State must be "acting in the exercise of elements of the governmental authority" of the receiving State. There will only be an act attributable to the receiving State where the conduct of the loaned organ involves the exercise of the governmental authority of that State. By comparison with the number of cases of cooperative action by States in fields such as mutual defence, aid and development, article 6 covers only a specific and limited notion of "transferred responsibility". Yet in State practice the situation is not unknown.

(6) In the *Chevreau* case,[138] a British consul in Persia, temporarily placed in charge of the French consulate, lost some papers entrusted to him. On a claim being brought by France, Arbitrator Beichmann held that "the British Government cannot be held responsible for negligence by its Consul in his capacity as the person in charge of the Consulate of another Power."[139] It is implicit in the Arbitrator's finding that the agreed terms on which the British Consul was acting contained no provision allocating responsibility for the consul's acts. If a third State had brought a claim, the proper respondent in accordance with article 6 would have been the State on whose behalf the conduct in question was carried out.

(7) Similar issues were considered by the European Commission of Human Rights in two cases relating to the exercise by Swiss police in Liechtenstein of "delegated" powers.[140] At the relevant time Liechtenstein was not a party to the European Convention, so that if the conduct was attributable only to Liechtenstein no breach of the Convention could have occurred. The Commission held the case admissible, on the basis that under the treaty governing the relations between Switzerland and Liechtenstein of 1923, Switzerland exercised its own customs and immigration jurisdiction in Liechtenstein, albeit with the latter's consent and in their mutual

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[138] *UNRIAA*, vol. II, p. 1113 (1931).

[139] *Ibid.*, at p. 1141.

[140] *X and Y v. Switzerland,* (Joined Apps. 7289/75 and 7349/76), (1977) 9 *D.R.* 57; 20 *Yearbook E.C.H.R.*, 372, at pp. 402-406.

interest. The officers in question were governed exclusively by Swiss law and were considered to be exercising the public authority of Switzerland. In that sense, they were not "placed at the disposal" of the receiving State.[141]

(8) A further, long-standing example, of a situation to which article 6 applies is the Judicial Committee of the Privy Council, which has acted as the final court of appeal for a number of independent States within the Commonwealth. Decisions of the Privy Council on appeal from an independent Commonwealth State will be attributable to that State and not to the United Kingdom. The Privy Council's role is paralleled by certain final courts of appeal acting pursuant to treaty arrangements.[142] There are many examples of judges seconded by one State to another for a time: in their capacity as judges of the receiving State, their decisions are not attributable to the sending State, even if it continues to pay their salaries.

(9) Similar questions could also arise in the case of organs of international organizations placed at the disposal of a State and exercising elements of that State's governmental authority. This is even more exceptional than the interstate cases to which article 6 is limited. It also raises difficult questions of the relations between States and international organizations, questions which fall outside the scope of these Articles. Article 57 accordingly excludes from the ambit of the articles all questions of the responsibility of international organizations or of a State for the acts of an international organization. By the same token, article 6 does not concern those cases where, for example, accused persons are transferred by a State to an international institution pursuant to treaty.[143] In cooperating with international institutions in such a case, the State concerned does not assume responsibility for their subsequent conduct.

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[141] See also *Drozd and Janousek v. France and Spain, E.C.H.R., Series A, No. 240* (1992) at paras. 96, 110. See also *Comptroller and Auditor-General v. Davidson,* (1996) *I.L.R.,* vol. 104, p. 526 (Court of Appeal, New Zealand), at pp. 536-537 (Cooke, P.), and at pp. 574-576 (Richardson, J.). An appeal to the Privy Council on other grounds was dismissed: *I.L.R.,* vol. 108, p. 622.

[142] E.g. the Agreement between Nauru and Australia relating to Appeals to the High Court of Australia from the Supreme Court of Nauru, United Nations, *Treaty Series,* vol. 1216, p. 151.

[143] See, e.g., Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, art. 89.

Article 7

Excess of authority or contravention of instructions

> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Commentary

(1) Article 7 deals with the important question of unauthorized or *ultra vires* acts of State organs or entities. It makes it clear that the conduct of a State organ or an entity empowered to exercise elements of the governmental authority, acting in its official capacity, is attributable to the State even if the organ or entity acted in excess of authority or contrary to instructions.

(2) The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question.[144] Any other rule would contradict the basic principle stated in article 3, since otherwise a State could rely on its internal law in order to argue that conduct, in fact carried out by its organs, was not attributable to it.

(3) The rule evolved in response to the need for clarity and security in international relations. Despite early equivocal statements in diplomatic practice and by arbitral tribunals,[145] State practice came to support the proposition, articulated by the British Government in response to an Italian request, that "all Governments should always be held responsible for all acts committed

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[144] See e.g. the "Star and Herald" controversy, Moore, *Digest*, vol. VI, p. 775.

[145] In a number of early cases, international responsibility was attributed to the State for the conduct of officials without making it clear whether the officials had exceeded their authority: see, e.g., *"The Only Son"*, Moore, *International Arbitrations*, vol. IV, pp. 3404, at pp. 3404-3405; *"The William Lee"*, ibid, vol. IV, p. 3405; the *Donoughho*, Moore, *International Arbitrations*, vol. III, p. 3012 (1876). Where the question was expressly examined tribunals did not consistently apply any single principle: see, e.g., *Collector of Customs: Lewis's Case*, ibid., vol. III, p. 3019; the *Gadino* case, *UNRIAA*, vol. XV, p. 414 (1901); *"The Lacaze"*, de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. II, p. 290, at pp. 297-298; *"The William Yeaton"*, Moore, *International Arbitrations*, vol. III, p. 2944, at p. 2946.

by their agents by virtue of their official capacity".[146] As the Spanish Government pointed out: "If this were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received."[147] At this time the United States supported "a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but of their apparent authority".[148] It is probable that the different formulations had essentially the same effect, since acts falling outside the scope of both real and apparent authority would not be performed "by virtue of … official capacity". In any event, by the time of the Hague Codification Conference in 1930, a majority of States responding to the Preparatory Committee's request for information were clearly in favour of the broadest formulation of the rule, providing for attribution to the State in the case of "[a]cts of officials in the national territory in their public capacity (*actes de fonction*) but exceeding their authority".[149] The Basis of Discussion prepared by the Committee reflected this view. The Third Committee of the Conference adopted an article on first reading in the following terms:

> "International responsibility is… incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State"[150]

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[146] For the opinions of the British and Spanish Governments given in 1898 at the request of Italy in respect of a dispute with Peru see *Archivio del Ministero degli Affari esteri italiano*, serie politica P, No. 43.

[147] Note verbale by Duke Almodóvar del Rio, 4 July 1898, ibid.

[148] "American Bible Society" incident, statement of United States Secretary of State, 17 August 1885, Moore, *Digest*, vol. VI, p. 743; "Shine and Milligen", Hackworth, *Digest*, vol. V, p. 575; "Miller", Hackworth, *Digest*, vol. V, pp. 570-571.

[149] Point V, No. 2 (b), League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee* (Doc. C.75.M.69.1929.V.), Vol. III, p. 74; and *Supplement to Vol. III* (Doc. C.75 (a). M.69(a)1929.V.), pp. 3 and 17.

[150] Ibid., p. 238. For a more detailed account of the evolution of the modern rule see *Yearbook ... 1975*, vol. II, pp. 61-70.

(4) The modern rule is now firmly established in this sense by international jurisprudence, State practice and the writings of jurists.[151] It is confirmed, for example, in article 91 of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949,[152] which provides that: "A Party to the conflict … shall be responsible for all acts by persons forming part of its armed forces": this clearly covers acts committed contrary to orders or instructions. The commentary notes that article 91 was adopted by consensus and "correspond[s] to the general principles of law on international responsibility".[153]

(5) A definitive formulation of the modern rule is found in the *Caire* case. The case concerned the murder of a French national by two Mexican officers who, after failing to extort money, took Caire to the local barracks and shot him. The Commission held …

> "that the two officers, even if they are deemed to have acted outside their competence … and even if their superiors countermanded an order, have involved the responsibility of the State, since they acted under cover of their status as officers and used means placed at their disposal on account of that status."[154]

(6) International human rights courts and tribunals have applied the same rule. For example the Inter-American Court of Human Rights in the *Velásquez Rodríguez Case* said …

> "This conclusion [of a breach of the Convention] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts

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[151] For example, the 1961 revised draft by Special Rapporteur F.V. García Amador provided that "an act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity". *Yearbook ... 1961*, vol. II, p. 53.

[152] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), United Nations, *Treaty Series*, vol. 1125, p. 3.

[153] International Committee of the Red Cross, *Commentary on the Additional Protocols* (Geneva, 1987), pp. 1053-1054.

[154] *UNRIAA*, vol, p. 516 (1929), at p. 531. For other statements of the rule see *Maal,* UNRIAA, vol. X, p. 730 (1903) at pp. 732-733; *La Masica, UNRIAA*, vol. XI, p. 549 (1916), at p. 560; *Youmans, UNRIAA*, vol.IV, p. 110 (1916), at p. 116; *Mallen,* ibid., vol. IV (1925), p. 173, at

> of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law."[155]

(7) The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been "carried out by persons cloaked with governmental authority."[156]

(8) The problem of drawing the line between unauthorized but still "official" conduct, on the one hand, and "private" conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression "if the organ, person or entity acts in that capacity" in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State.[157] In short, the question is whether they were acting with apparent authority.

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p. 177; *Stephens,* ibid, vol. IV, p. 265 (1927), at pp. 267-268; Way, ibid, vol. IV, p. 391 (1925), at pp. 400-01. The decision of the United States Court of Claims in *Royal Holland Lloyd v. United States,*73 Ct. Cl. 722 (1931); A.D.P.I.L.C, vol 6, p. 442 is also often cited.

[155] *Inter-Am.Ct.H.R., Series C, No. 4* (1989), at para. 170; 95 *I.L.R.* 232, at p. 296.

[156] *Petrolane, Inc. v. Islamic Republic of Iran* (1991) 27 *Iran-U.S.C.T.R.* 64, at p. 92. See commentary to article 4, paragraph (13).

[157] One form of *ultra vires* conduct covered by article 7 would be for a State official to accept a bribe to perform some act or conclude some transaction. The Articles are not concerned with questions that would then arise as to the validity of the transaction (cf. Vienna Convention on the Law of Treaties, art. 50). So far as responsibility for the corrupt conduct is concerned, various

(9) As formulated, article 7 only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, i.e. only to those cases of attribution covered by articles 4, 5 and 6. Problems of unauthorized conduct by other persons, groups or entities give rise to distinct problems, which are dealt with separately under articles 8, 9 and 10.

(10) As a rule of attribution, article 7 is not concerned with the question whether the conduct amounted to a breach of an international obligation. The fact that instructions given to an organ or entity were ignored, or that its actions were *ultra vires*, may be relevant in determining whether or not the obligation has been breached, but that is a separate issue.[158] Equally, article 7 is not concerned with the admissibility of claims arising from internationally wrongful acts committed by organs or agents acting *ultra vires* or contrary to their instructions. Where there has been an unauthorized or invalid act under local law and as a result a local remedy is available, this will have to be resorted to, in accordance with the principle of exhaustion of local remedies, before bringing an international claim.[159]

Article 8

Conduct directed or controlled by a State

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Commentary

(1) As a general principle, the conduct of private persons or entities is not attributable to the State under international law. Circumstances may arise, however, where such conduct is

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situations could arise which it is not necessary to deal with expressly in the present Articles. Where one State bribes an organ of another to perform some official act, the corrupting State would be responsible either under article 8 or article 17. The question of the responsibility of the State whose official had been bribed towards the corrupting State in such a case could hardly arise, but there could be issues of its responsibility towards a third party, which would be properly resolved under article 7.

[158] See *Elettronica Sicula S.p.A. (ELSI), I.C.J. Reports 1989*, p. 15, esp. at pp. 52, 62 and 74.

[159] See further article 44 (b) and commentary.

nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State. Article 8 deals with two such circumstances. The first involves private persons acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons act under the State's direction or control.[160] Bearing in mind the important role played by the principle of effectiveness in international law, it is necessary to take into account in both cases the existence of a real link between the person or group performing the act and the State machinery.

(2) The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence.[161] In such cases it does not matter that the person or persons involved are private individuals nor whether their conduct involves "governmental activity". Most commonly cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighbouring countries, or who are instructed to carry out particular missions abroad.

(3) More complex issues arise in determining whether conduct was carried out "under the direction or control" of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.

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[160] Separate issues are raised where one State engages in internationally wrongful conduct at the direction or under the control of another State: see article 17 and commentary, and especially para. (7) for the meaning of the words "direction" and "control" in various languages..

[161] See, e.g., the *Zafiro* case, *UNRIAA.*, vol. VI, p. 160 (1925); *Stephens*, *UNRIAA*, vol. IV, p. 265 (1927), at p. 267; *Lehigh Valley Railroad Company, and others (U.S.A.) v. Germany (Sabotage Cases)*: "*Black Tom*" and "*Kingsland*" incidents, *UNRIAA.*, vol. VIII, p. 84 (1930); and *UNRIAA.*, vol. VIII, p. 225 (1939), at p. 458.

(4) The degree of control which must be exercised by the State in order for the conduct to be attributable to it was a key issue in the *Military and Paramilitary* case.[162] The question was whether the conduct of the *contras* was attributable to the United States so as to hold the latter generally responsible for breaches of international humanitarian law committed by the *contras*. This was analyzed by the Court in terms of the notion of "control". On the one hand, it held that the United States was responsible for the "planning, direction and support" given by United States to Nicaraguan operatives.[163] But it rejected the broader claim of Nicaragua that all the conduct of the *contras* was attributable to the United States by reason of its control over them. It concluded that:

> "[D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf … All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[164]

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[162] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986,* p. 14.

[163] Ibid., p. 51, para. 86.

[164] Ibid., pp. 62 and 64-65, paras. 109 and 115. See also the concurring opinion of Judge Ago, ibid., p. 189, para. 17.

Thus while the United States was held responsible for its own support for the *contras*, only in certain individual instances were the acts of the *contras* themselves held attributable to it, based upon actual participation of and directions given by that State. The Court confirmed that a general situation of dependence and support would be insufficient to justify attribution of the conduct to the State.

(5) The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has also addressed these issues.[165] In *Prosecutor v. Tadić*, the Chamber stressed that:

> "The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control."[166]

The Appeals Chamber held that the requisite degree of control by the Yugoslavian authorities over these armed forces required by international law for considering the armed conflict to be international was "*overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations".[167] In the course of their reasoning, the majority considered it necessary to disapprove the International Court's approach in *Military and Paramilitary activities*. But the legal issues and the factual situation in that case were different from those facing the International Court in *Military and Paramilitary activities*. The Tribunal's mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law.[168] In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.[169]

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[165] Case IT-94-1, *Prosecutor v. Tadić*, (1999) *I.L.M.*, vol. 38, p. 1518. For the judgment of the Trial Chamber (1997), see *I.L.R.*, vol. 112 , p. 1.

[166] Case IT-94-1, *Prosecutor v. Tadić*, (1999) *I.L.M.*, vol. 38, p. 1518, at p. 1541, para. 117 (emphasis in original).

[167] Ibid., at p. 1546, para. 145 (emphasis in original).

(6) Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the "corporate veil" is a mere device or a vehicle for fraud or evasion.[170] The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.[171] Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. This was the position taken, for example, in relation to the de facto seizure of property by a State-owned oil company, in a case where there was no proof that the State used its

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[168] See the explanation given by Judge Shahabuddeen, ibid., at pp. 1614-1615.

[169] The problem of the degree of State control necessary for the purposes of attribution of conduct to the State has also been dealt with, for example, by the Iran-United States Claims Tribunal: *Yeager v. Islamic Republic of Iran,* (1987) 17 *Iran-U.S.C.T.R.* 92, at p. 103. See also *Starrett Housing Corp. v. Government of the Islamic Republic of Iran* (1983) 4 *Iran-U.S.C.T.R.* 122, at p. 143, and by the European Court of Human Rights, *Loizidou v. Turkey, Merits, E.C.H.R. Reports*, 1996-VI, p. 2216, at pp. 2235-2236, para. 56. See also ibid., at p. 2234, para. 52, and the decision on the preliminary objections: *E.C.H.R., Series A, No. 310* (1995), at para. 62.

[170] *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970,* p. 3, at p. 39, para. 56-58.

[171] E.g. the Workers' Councils considered in *Schering Corporation v. Islamic Republic of Iran,* (1984) 5 *Iran-U.S.C.T.R.* 361; *Otis Elevator Co. v. Islamic Republic of Iran,* (1987) 14 *Iran-U.S.C.T.R.* 283; *Eastman Kodak Co. v. Islamic Republic of Iran,* (1987) 17 *Iran-U..S.C.T.R.* 153.

ownership interest as a vehicle for directing the company to seize the property.[172] On the other hand, where there was evidence that the corporation was exercising public powers [173] or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result,[174] the conduct in question has been attributed to the State.[175]

(7) It is clear then that a State may, either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of. In the text of article 8, the three terms "instructions", "direction" and "control" are disjunctive; it is sufficient to establish any one of them. At the same time it is made clear that the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act.

(8) Where a State has authorized an act, or has exercised direction or control over it, questions can arise as to the State's responsibility for actions going beyond the scope of the authorization. For example questions might arise if the agent, while carrying out lawful instructions or directions, engages in some activity which contravenes both the instructions or directions given and the international obligations of the instructing State. Such cases can be resolved by asking whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it. In general a State, in giving lawful instructions to persons who are not its organs, does not assume the risk that the instructions will be carried out in an internationally unlawful way. On the other hand, where persons or groups have committed acts

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[172] *SEDCO, Inc. v. National Iranian Oil Co.*, (1987) 15 *Iran-U.S.C.T.R.* 23. See also *International Technical Products Corp. v. Islamic Republic of Iran*, (1985) 9 *Iran-U.S.C.T.R.* 206; *Flexi-Van Leasing, Inc. v. Islamic Republic of Iran*, (1986) 12 *Iran-U.S.C.T.R.* 335, at p. 349.

[173] *Phillips Petroleum Co. Iran v. Islamic Republic of Iran* (1989) 21 *Iran-U.S.C.T.R.* 79; *Petrolane, Inc. v. Government of the Islamic Republic of Iran* (1991) 27 *Iran-U.S.C.T.R.* 64.

[174] *Foremost Tehran, Inc. v. Islamic Republic of Iran* (1986) 10 *Iran-U.S.C.T.R.* 228; *American Bell International Inc. v. Islamic Republic of Iran* (1986) 12 *Iran-U.S.C.T.R.* 170.

[175] Cf. also *Hertzberg et al. v. Finland*, (Communication No. R.14/61), (1982), A/37/40, annex XIV, para. 9.1. See also *X v. Ireland*, (App. 4125/69), (1971) 14 *Yearbook E.C.H.R.* 198; *Young, James and Webster v. United Kingdom, E.C.H.R., Series A, No. 44* (1981).

under the effective control of a State the condition for attribution will still be met even if particular instructions may have been ignored. The conduct will have been committed under the control of the State and it will be attributable to the State in accordance with article 8.

(9) Article 8 uses the words "person or group of persons", reflecting the fact that conduct covered by the article may be that of a group lacking separate legal personality but acting on a de facto basis. Thus while a State may authorize conduct by a legal entity such as a corporation, it may also deal with aggregates of individuals or groups that do not have legal personality but are nonetheless acting as a collective.

Article 9

Conduct carried out in the absence or default of the official authorities

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Commentary

(1) Article 9 deals with the exceptional case of conduct in the exercise of elements of the governmental authority by a person or group of persons acting in the absence of the official authorities and without any actual authority to do so. The exceptional nature of the circumstances envisaged in the article is indicated by the phrase "in circumstances such as to call for". Such cases occur only rarely, such as during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative. They may also cover cases where lawful authority is being gradually restored, e.g., after foreign occupation.

(2) The principle underlying article 9 owes something to the old idea of the *levée en masse*, the self-defence of the citizenry in the absence of regular forces:[176] in effect it is a form of agency of necessity. Instances continue to occur from time to time in the field of State

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[176] This principle is recognized as legitimate by article 2 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land: J. B. Scott (ed.), *The Proceedings of the Hague Peace Conferences: The Conference of 1907* (New York, Oxford University Press, 1920), vol. I, p. 623; and by article 4, paragraph A (6), of the Geneva Convention of 12 August 1949 on the Treatment of Prisoners of War, United Nations, *Treaty Series*, vol. 75, p. 135.

responsibility. Thus the position of the Revolutionary Guards or "Komitehs" immediately after the revolution in the Islamic Republic of Iran was treated by the Iran-United States Claims Tribunal as covered by the principle expressed in article 9. *Yeager v. Islamic Republic of Iran* concerned, *inter alia*, the action of performing immigration, customs and similar functions at Tehran airport in the immediate aftermath of the revolution. The Tribunal held the conduct attributable to the Islamic Republic of Iran, on the basis that, if it was not actually authorized by the Government, then the Guards …

> "at least exercised elements of the governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object."[177]

(3) Article 9 establishes three conditions which must be met in order for conduct to be attributable to the State: first, the conduct must effectively relate to the exercise of elements of the governmental authority, secondly, the conduct must have been carried out in the absence or default of the official authorities, and thirdly, the circumstances must have been such as to call for the exercise of those elements of authority.

(4) As regards the first condition, the person or group acting must be performing governmental functions, though they are doing so on their own initiative. In this respect, the nature of the activity performed is given more weight than the existence of a formal link between the actors and the organization of the State. It must be stressed that the private persons covered by article 9 are not equivalent to a general de facto government. The cases envisaged by article 9 presuppose the existence of a government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general de facto government, on the other hand, is itself an apparatus of the State, replacing that which existed previously. The conduct of the organs of such a government is covered by article 4 rather than article 9.[178]

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[177] (1987) 17 *Iran*-U.S.C.T.R. 92 at p. 104, para. 43

[178] See e,g. the award by Arbitrator Taft in the *Aguilar-Amory and Royal Bank of Canada Claims (Timoco Case), UNRIAA*, vol. 1, p. 371 (1923) at pp. 381-2. On the responsibility of the State for the conduct of *de facto* Governments, see also J.A. Frowein, *Das de facto-Regime im Völkerrecht (*Cologne, Heymanns, 1968), pp. 70-71. Conduct of a Government in exile might be covered by article 9, depending on the circumstances.

(5) In respect of the second condition, the phrase "in the absence or default of" is intended to cover both the situation of a total collapse of the State apparatus as well as cases where the official authorities are not exercising their functions in some specific respect, for instance, in the case of a partial collapse of the State or its loss of control over a certain locality. The phrase "absence or default" seeks to capture both situations.

(6) The third condition for attribution under article 9 requires that the circumstances must have been such as to call for the exercise of elements of the governmental authority by private persons. The term "called for" conveys the idea that some exercise of governmental functions was called for, though not necessarily the conduct in question. In other words, the circumstances surrounding the exercise of elements of the governmental authority by private persons must have justified the attempt to exercise police or other functions in the absence of any constituted authority. There is thus a normative element in the form of agency entailed by article 9, and this distinguishes these situations from the normal principle that conduct of private parties, including insurrectionary forces, is not attributable to the State.[179]

Article 10

Conduct of an insurrectional or other movement

> 1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.
>
> 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.
>
> 3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

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[179] See e.g. *Sambiaggio, UNRIAA.*, vol. X, p.499 (1904); and see further below, article 10 and commentary.

Commentary

(1) Article 10 deals with the special case of attribution to a State of conduct of an insurrectional or other movement which subsequently becomes the new government of the State or succeeds in establishing a new State.

(2) At the outset, the conduct of the members of the movement presents itself purely as the conduct of private individuals. It can be placed on the same footing as that of persons or groups who participate in a riot or mass demonstration and it is likewise not attributable to the State. Once an organized movement comes into existence as a matter of fact, it will be even less possible to attribute its conduct to the State, which will not be in a position to exert effective control over its activities. The general principle in respect of the conduct of such movements, committed during the continuing struggle with the constituted authority, is that it is not attributable to the State under international law. In other words, the acts of unsuccessful insurrectional movements are not attributable to the State, unless under some other article of chapter II, for example in the special circumstances envisaged by article 9.

(3) Ample support for this general principle is found in arbitral jurisprudence. International arbitral bodies, including mixed claims commissions[180] and arbitral tribunals[181] have uniformly affirmed what Commissioner Nielsen in the *Solis* case described as a "well-established principle of international law", that no government can be held responsible for the conduct of rebellious groups committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection.[182] Diplomatic practice is remarkably consistent in recognizing that the conduct of an insurrectional movement cannot be attributed to the State. This can be seen, for example, from the preparatory work for the 1930 Codification Conference. Replies of Governments to point IX of the request for information

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[180] See the decisions of the various mixed commissions: *Zuloaga and Miramon Governments,* Moore, *International Arbitrations*, vol. III, p. 2873; *McKenny,* ibid, vol. III, p. 2881; *Confederate States, ibid*, vol. III, p. 2886; *Confederate Debt*, ibid., vol. III, p 2900; *Maximilian Government,* Moore, ibid., p. 2902, at pp. 2928-2929.

[181] See e.g. *British Claims in the Spanish Zone of Morocco, UNRIAA.*, vol. II, p. 615 (1925), at p. 642; *Several British Subjects (Iloilo Claims), UNRIAA.*, vol. VI, p. 158 (1925), at pp. 159-160.

[182] *UNRIAA.*, vol. IV, p. 358 (1928), at p. 361 (referring to *Home Missionary Society*, *UNRIAA.*, vol. VI, p. 42 (1920); Cf. the *Sambiaggio* case, *UNRIAA.*, vol. X, p. 499 (1903), at p. 524.

addressed to them by the Preparatory Committee indicated substantial agreement that: (a) the conduct of organs of an insurrectional movement could not be attributed as such to the State or entail its international responsibility; and (b) only conduct engaged in by organs of the State in connection with the injurious acts of the insurgents could be attributed to the State and entail its international responsibility, and then only if such conduct constituted a breach of an international obligation of that State.[183]

(4) The general principle that the conduct of an insurrectional or other movement is not attributable to the State is premised on the assumption that the structures and organization of the movement are and remain independent of those of the State. This will be the case where the State successfully puts down the revolt. In contrast, where the movement achieves its aims and either installs itself as the new government of the State or forms a new State in part of the territory of the pre-existing State or in a territory under its administration, it would be anomalous if the new regime or new State could avoid responsibility for conduct earlier committed by it. In these exceptional circumstances, article 10 provides for the attribution of the conduct of the successful insurrectional or other movement to the State. The basis for the attribution of conduct of a successful insurrectional or other movement to the State under international law lies in the continuity between the movement and the eventual government. Thus the term "conduct" only concerns the conduct of the movement as such and not the individual acts of members of the movement, acting in their own capacity.

(5) Where the insurrectional movement, as a new government, replaces the previous government of the State, the ruling organization of the insurrectional movement becomes the ruling organization of that State. The continuity which thus exists between the new organization of the State and that of the insurrectional movement leads naturally to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle. In such a case, the State does not cease to exist as a subject of international law. It remains the same State, despite the changes, reorganizations and adaptations which occur in its institutions. Moreover it is the only subject of international law to which responsibility can be attributed.

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[183] League of Nations, Conference for the Codification of International Law, vol. III: *Bases of Discussion for the Conference drawn up by the Preparatory Committee* (Doc. C.75.M.69.1929.V.), p. 108; *Supplement to Volume III: Replies made by the Governments to the Schedule of Points: Replies of Canada and the United States of America* (Doc. C.75(a).M.69(a).1929.V.), pp. 3, 20.

The situation requires that acts committed during the struggle for power by the apparatus of the insurrectional movement should be attributable to the State, alongside acts of the then established government.

(6) Where the insurrectional or other movement succeeds in establishing a new State, either in part of the territory of the pre-existing State or in a territory which was previously under its administration, the attribution to the new State of the conduct of the insurrectional or other movement is again justified by virtue of the continuity between the organization of the movement and the organization of the State to which it has given rise. Effectively the same entity which previously had the characteristics of an insurrectional or other movement has become the government of the State it was struggling to establish. The predecessor State will not be responsible for those acts. The only possibility is that the new State be required to assume responsibility for conduct committed with a view to its own establishment, and this represents the accepted rule.

(7) Paragraph 1 of article 10 covers the scenario in which the insurrectional movement, having triumphed, has substituted its structures for those of the previous government of the State in question. The phrase "which becomes the new government" is used to describe this consequence. However, the rule in paragraph 1 should not be pressed too far in the case of governments of national reconciliation, formed following an agreement between the existing authorities and the leaders of an insurrectional movement. The State should not be made responsible for the conduct of a violent opposition movement merely because, in the interests of an overall peace settlement, elements of the opposition are drawn into a reconstructed government. Thus the criterion of application of paragraph 1 is that of a real and substantial continuity between the former insurrectional movement and the new government it has succeeded in forming.

(8) Paragraph 2 of article 10 addresses the second scenario, where the structures of the insurrectional or other revolutionary movement become those of a new State, constituted by secession or decolonization in part of the territory which was previously subject to the sovereignty or administration of the predecessor State. The expression "or in any other territory under its administration" is included in order to take account of the differing legal status of different dependent territories.

(9) A comprehensive definition of the types of groups encompassed by the term "insurrectional movement" as used in article 10 is made difficult by the wide variety of forms which insurrectional movements may take in practice, according to whether there is relatively limited internal unrest, a genuine civil war situation, an anti-colonial struggle, the action of a national liberation front, revolutionary or counter-revolutionary movements and so on. Insurrectional movements may be based in the territory of the State against which the movement's actions are directed, or on the territory of a third State. Despite this diversity, the threshold for the application of the laws of armed conflict contained in Additional Protocol II of 1977 may be taken as a guide.[184] Article 1, paragraph 1 refers to "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the relevant State's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol", and it contrasts such groups with "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar character" (article 1, para. 2). This definition of "dissident armed forces" reflects, in the context of the Protocols, the essential idea of an "insurrectional movement".

(10) As compared with paragraph 1, the scope of the attribution rule articulated by paragraph 2 is broadened to include "insurrectional or other" movements. This terminology reflects the existence of a greater variety of movements whose actions may result in the formation of a new State. The words do not however extend to encompass the actions of a group of citizens advocating separation or revolution where these are carried out within the framework of the predecessor State. Nor does it cover the situation where an insurrectional movement within a territory succeeds in its agitation for union with another State. This is essentially a case of succession, and outside the scope of the articles, whereas article 10 focuses on the continuity of the movement concerned and the eventual new government or State, as the case may be.

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[184] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II), United Nations, *Treaty Series*, vol. 1125, p. 609

(11) No distinction should be made for the purposes of article 10 between different categories of movements on the basis of any international "legitimacy" or of any illegality in respect of their establishment as a government, despite the potential importance of such distinctions in other contexts.[185] From the standpoint of the formulation of rules of law governing State responsibility, it is unnecessary and undesirable to exonerate a new government or a new State from responsibility for the conduct of its personnel by reference to considerations of legitimacy or illegitimacy of its origin.[186] Rather, the focus must be on the particular conduct in question, and on its lawfulness or otherwise under the applicable rules of international law.

(12) Arbitral decisions, together with State practice and the literature, indicate a general acceptance of the two positive attribution rules in article 10. The international arbitral decisions, e.g. those of the mixed commissions established in respect of Venezuela (1903) and Mexico (1920-1930), support the attribution of conduct by insurgents where the movement is successful in achieving its revolutionary aims. For example in the *Bolivar Railway Company* claim, the principle is stated in the following terms:

> "The nation is responsible for the obligations of a successful revolution from its beginning, because in theory, it represented *ab initio* a changing national will, crystallizing in the finally successful result."[187]

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[185] See H. Atlam, "International Liberation Movements and International Responsibility", in B. Simma & M. Spinedi (eds.), *United Nations Codification of State Responsibility* (New York, Oceana, 1987), p. 35.

[186] As the Court said in the *Namibia* advisory opinion, "[p]hysical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States": *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 16, at p. 54, para. 118.

[187] *UNRIAA.*, vol. IX, p. 445 (1903), at p. 453. See also *Puerto Cabello and Valencia Railway Company*, ibid., vol. IX, p. 510 (1903), at p. 513.

The French-Venezuelan Mixed Claims Commission in its decision concerning the *French Company of Venezuelan Railroads* emphasized that the State cannot be held responsible for the acts of revolutionaries "unless the revolution was successful", since such acts then involve the responsibility of the State "under the well-recognized rules of public law".[188] In the *Pinson* case, the French-Mexican Claims Commission ruled that …

> "if the injuries originated, for example, in requisitions or forced contributions demanded ... by revolutionaries before their final success, or if they were caused... by offenses committed by successful revolutionary forces, the responsibility of the State … cannot be denied."[189]

(13) The possibility of holding the State responsible for conduct of a successful insurrectional movement was brought out in the request for information addressed to Governments by the Preparatory Committee for the 1930 Codification Conference.[190] On the basis of replies received from a number of governments, the Preparatory Committee of the Conference drew up the following Basis of Discussion: "A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops."[191] Although the proposition was never discussed, it may be considered to reflect the rule of attribution now contained in paragraph 2.

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[188] *UNRIAA.*, vol. X, p. 285 (1902), at p. 354. See also *Dix* case, *UNRIAA*, vol. IX, p. 119 (1902).

[189] *UNRIAA.*, vol. V, p. 327 (1928), at p. 353.

[190] League of Nations, Conference for the Codification of International Law, vol. III: *Bases of Discussion for the Conference drawn up by the Preparatory Committee* (Doc. C.75.M.69.1929.V.), pp. 108, 116; reproduced in *Yearbook ... 1956,* vol. II, p. 223, at p. 224.

[191] Basis of Discussion No. 22 (c), League of Nations, Conference for the Codification of International Law, Vol. III: *Bases of Discussion for the Conference drawn up by the Preparatory Committee* (Doc. C.75.M.69.1929.V.), p. 118; reproduced in *Yearbook ... 1956,* vol. II, p. 223, at p. 224.

(14) More recent decisions and practice do not, on the whole, give any reason to doubt the propositions contained in article 10. In one case the Supreme Court of Namibia went even further in accepting responsibility for "anything done" by the predecessor administration of South Africa.[192]

(15) Exceptional cases may occur where the State was in a position to adopt measures of vigilance, prevention or punishment in respect of the movement's conduct but improperly failed to do so. This possibility is preserved by paragraph 3 of article 10, which provides that the attribution rules of paragraphs 1 and 2 are without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of other provisions in chapter II. The term "however related to that of the movement concerned" is intended to have a broad meaning. Thus the failure by a State to take available steps to protect the premises of diplomatic missions, threatened from attack by an insurrectional movement, is clearly conduct attributable to the State and is preserved by paragraph 3.

(16) A further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces. The topic of the international responsibility of unsuccessful insurrectional or other movements, however, falls outside the scope of the present Articles, which are concerned only with the responsibility of States.

Article 11

Conduct acknowledged and adopted by a State as its own

> Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

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[192] Guided in particular by a constitutional provision the Court held that "the new government inherits responsibility for the acts committed by the previous organs of the State": *Minister of Defence, Namibia v. Mwandinghi,* 1992 (2) SA 355 at p. 360; *I.L.R.*, vol. 91, p. 341, at p. 361. See on the other hand *44123 Ontario Ltd. v. Crispus Kiyonga,* (1992) 11 Kampala LR 14, at p. 20-1; *I.L.R.*, vol. 103, p. 259, at p. 266 (High Court, Uganda).

Commentary

(1) All the bases for attribution covered in chapter II, with the exception of the conduct of insurrectional or other movements under article 10, assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the alleged wrongful act. Article 11, by contrast, provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own.

(2) In many cases, the conduct which is acknowledged and adopted by a State will be that of private persons or entities. The general principle, drawn from State practice and international judicial decisions, is that the conduct of a person or group of persons not acting on behalf of the State is not considered as an act of the State under international law. This conclusion holds irrespective of the circumstances in which the private person acts and of the interests affected by the person's conduct.

(3) Thus like article 10, article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes "nevertheless" that conduct is to be considered as an act of a State "if and to the extent that the State acknowledges and adopts the conduct in question as its own". Instances of the application of the principle can be found in judicial decisions and State practice. For example, in the *Lighthouses* arbitration, a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been "endorsed by [Greece] as if it had been a regular transaction … and eventually continued by her, even after the acquisition of territorial sovereignty over the island …"[193] In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory.[194] However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it.

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[193] *UNRIAA.*, vol. XII, p. 155 (1956), at p. 198.

[194] The matter is reserved by art. 39, Vienna Convention on Succession of States in Respect of Treaties, United Nations, *Treaty Series*, vol. 1946, p. 3.

(4) Outside the context of State succession, the *Diplomatic and Consular Staff* case[195] provides a further example of subsequent adoption by a State of particular conduct. There the Court drew a clear distinction between the legal situation immediately following the seizure of the United States embassy and its personnel by the militants, and that created by a decree of the Iranian State which expressly approved and maintained the situation. In the words of the Court:

> "The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State."[196]

In that case it made no difference whether the effect of the "approval" of the conduct of the militants was merely prospective, or whether it made the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel *ab initio*. The Islamic Republic of Iran had already been held responsible in relation to the earlier period on a different legal basis, viz., its failure to take sufficient action to prevent the seizure or to bring it to an immediate end.[197] In other cases no such prior responsibility will exist. Where the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect, which is what the Tribunal did in the *Lighthouses* arbitration.[198] This is consistent with the position established by article 10 for insurrectional movements and avoids gaps in the extent of responsibility for what is, in effect, the same continuing act.

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[195] *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980,* p. 3

[196] Ibid., at p. 35, para. 74.

[197] Ibid., at pp. 31-33, paras. 63-68.

[198] *UNRIAA.*, vol. XII, p. 161 (1956), at pp. 197-8.

(5) As regards State practice, the capture and subsequent trial in Israel of Adolf Eichmann may provide an example of the subsequent adoption of private conduct by a State. On 10 May 1960, Eichmann was captured by a group of Israelis in Buenos Aires. He was held in captivity in Buenos Aires in a private home for some weeks before being taken by air to Israel. Argentina later charged the Israeli Government with complicity in Eichmann's capture, a charge neither admitted nor denied by the Israeli Foreign Minister (Ms. Meir), during the Security Council's discussion of the complaint. She referred to Eichmann's captors as a "volunteer group".[199] Security Council resolution 138 of 23 June 1960 implied a finding that the Israeli Government was at least aware of, and consented to, the successful plan to capture Eichmann in Argentina. It may be that Eichmann's captors were "in fact acting on the instructions of or under the direction or control of" Israel, in which case their conduct was more properly attributed to the State under article 8. But where there are doubts about whether certain conduct falls within article 8, these may be resolved by the subsequent adoption of the conduct in question by the State.

(6) The phrase "acknowledges and adopts the conduct in question as its own" is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement[200] The Court in the *Diplomatic and Consular Staff* case used phrases such as "approval", "endorsement", "the seal of official governmental approval" and "the decision to perpetuate [the situation]".[201] These were sufficient in the context of that case, but as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In international controversies States often take positions which amount to "approval" or "endorsement" of conduct in some general sense but do not involve any assumption of responsibility. The language of "adoption", on the other hand, carries with it the idea that the

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[199] *S.C.O.R., Fifteenth Year,* 865th Mtg., 22 June 1960, p. 4.

[200] The separate question of aid or assistance by a State to internationally wrongful conduct of another State is dealt with in article 16.

[201] *Diplomatic and Consular Staff, I.C.J. Reports 1980,* p. 3.

conduct is acknowledged by the State as, in effect, its own conduct. Indeed, provided the State's intention to accept responsibility for otherwise non-attributable conduct is clearly indicated, article 11 may cover cases in which a State has accepted responsibility for conduct of which it did not approve, had sought to prevent and deeply regretted. However such acceptance may be phrased in the particular case, the term "acknowledges and adopts" in article 11 makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own.

(7) The principle established by article 11 governs the question of attribution only. Where conduct has been acknowledged and adopted by a State, it will still be necessary to consider whether the conduct was internationally wrongful. For the purposes of article 11, the international obligations of the adopting State are the criterion for wrongfulness. The conduct may have been lawful so far as the original actor was concerned, or the actor may have been a private party whose conduct in the relevant respect was not regulated by international law. By the same token, a State adopting or acknowledging conduct which is lawful in terms of its own international obligations does not thereby assume responsibility for the unlawful acts of any other person or entity. Such an assumption of responsibility would have to go further and amount to an agreement to indemnify for the wrongful act of another.

(8) The phrase "if and to the extent that" is intended to convey a number of ideas. First, the conduct of, in particular, private persons, groups or entities is not attributable to the State unless under some other article of chapter II or unless it has been acknowledged and adopted by the State. Secondly, a State might acknowledge and adopt conduct only to a certain extent. In other words a State may elect to acknowledge and adopt only some of the conduct in question. Thirdly, the act of acknowledgment and adoption, whether it takes the form of words or conduct, must be clear and unequivocal.

(9) The conditions of acknowledgement and adoption are cumulative, as indicated by the word "and". The order of the two conditions indicates the normal sequence of events in cases in which article 11 is relied on. Acknowledgement and adoption of conduct by a State might be express (as for example in the *Diplomatic and Consular Staff* case), or it might be inferred from the conduct of the State in question.

Chapter III

Breach of an international obligation

(1) There is a breach of an international obligation when conduct attributed to a State as a subject of international law amounts to a failure by that State to comply with an international obligation incumbent upon it, or, to use the language of article 2 (b), when such conduct constitutes "a breach of an international obligation of the State". This chapter develops the notion of a breach of an international obligation, to the extent that this is possible in general terms.

(2) It must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States.[202] In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc. There is no such thing as a breach of an international obligation in the abstract, and chapter III can only play an ancillary role in determining whether there has been such a breach, or the time at which it occurred, or its duration. Nonetheless a number of basic principles can be stated.

(3) The essence of an internationally wrongful act lies in the non-conformity of the State's actual conduct with the conduct it ought to have adopted in order to comply with a particular international obligation. Such conduct gives rise to the new legal relations which are grouped under the common denomination of international responsibility. Chapter III therefore begins with a provision specifying in general terms when it may be considered that there is a breach of an international obligation (article 12). The basic concept having been defined, the other provisions of the chapter are devoted to specifying how this concept applies to various situations. In particular, the chapter deals with the question of the intertemporal law as it applies to State responsibility, i.e. the principle that a State is only responsible for a breach of an international obligation if the obligation is in force for the State at the time of the breach (article 13), with the equally important question of continuing breaches (article 14), and with the special problem of

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[202] See the Introduction to these commentaries, paras. (2)-(4).

determining whether and when there has been a breach of an obligation which is directed not at single but at composite acts, i.e. where the essence of the breach lies in a series of acts defined in aggregate as wrongful (article 15).

(4) For the reason given in paragraph (2) above, it is neither possible nor desirable to deal in the framework of this Part with all the issues that can arise in determining whether there has been a breach of an international obligation. Questions of evidence and proof of such a breach fall entirely outside the scope of the Articles. Other questions concern rather the classification or typology of international obligations. These have only been included in the text where they can be seen to have distinct consequences within the framework of the secondary rules of State responsibility.[203]

Article 12

Existence of a breach of an international obligation

> There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Commentary

(1) As stated in article 2, a breach by a State of an international obligation incumbent upon it gives rise to its international responsibility. It is first necessary to specify what is meant by a breach of an international obligation. This is the purpose of article 12, which defines in the most general terms what constitutes a breach of an international obligation by a State. In order to conclude that there is a breach of an international obligation in any specific case, it will be necessary to take account of the other provisions of chapter III which specify further conditions relating to the existence of a breach of an international obligation, as well as the provisions of chapter V dealing with circumstances which may preclude the wrongfulness of an act of a State. But in the final analysis, whether and when there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.

(2) In introducing the notion of a breach of an international obligation, it is necessary again to emphasize the autonomy of international law in accordance with the principle stated in article 3. In the terms of article 12, the breach of an international obligation consists in the

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[203] See, e.g., the classification of obligations of conduct and results, commentary to article 12, paras. (11) and (12).

disconformity between the conduct required of the State by that obligation and the conduct actually adopted by the State - i.e., between the requirements of international law and the facts of the matter. This can be expressed in different ways. For example the International Court has used such expressions as "incompatibility with the obligations" of a State,[204] acts "contrary to" or "inconsistent with" a given rule,[205] and "failure to comply with treaty obligations".[206] In the *ELSI* case, a Chamber of the Court asked the "question whether the requisition was in conformity with the requirements... of the FCN Treaty".[207] The expression "not in conformity with what is required of it by that obligation" is the most appropriate to indicate what constitutes the essence of a breach of an international obligation by a State. It allows for the possibility that a breach may exist even if the act of the State is only partly contrary to an international obligation incumbent upon it. In some cases precisely defined conduct is expected from the State concerned; in others the obligation only sets a minimum standard above which the State is free to act. Conduct proscribed by an international obligation may involve an act or an omission or a combination of acts and omissions; it may involve the passage of legislation, or specific administrative or other action in a given case, or even a threat of such action, whether or not the threat is carried out, or a final judicial decision. It may require the provision of facilities, or the taking of precautions or the enforcement of a prohibition. In every case, it is by comparing the conduct in fact engaged in by the State with the conduct legally prescribed by the international obligation that one can determine whether or not there is a breach of that obligation. The phrase "is not in conformity with" is flexible enough to cover the many different ways in which an obligation can be expressed, as well as the various forms which a breach may take.

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[204] *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at p. 29, para. 56.

[205] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986*, p. 14, at p. 64, para. 115, and at p. 98, para. 186, respectively.

[206] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997*, p. 7, at p. 46, para. 57.

[207] *Elettronica Sicula S.p.A. (ELSI), I.C.J. Reports 1989*, p. 15, at p. 50, para. 70.

(3) Article 12 states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation "regardless of its origin". As this phrase indicates, the Articles are of general application. They apply to all international obligations of States, whatever their origin may be. International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order. States may assume international obligations by a unilateral act.[208] An international obligation may arise from provisions stipulated in a treaty (a decision of an organ of an international organization competent in the matter, a judgment given between two States by the International Court of Justice or another tribunal, etc.). It is unnecessary to spell out these possibilities in article 12, since the responsibility of a State is engaged by the breach of an international obligation whatever the particular origin of the obligation concerned. The formula "regardless of its origin" refers to all possible sources of international obligations, that is to say, to all processes for creating legal obligations recognized by international law. The word "source" is sometimes used in this context, as in the preamble to the Charter of the United Nations which stresses the need to respect "the obligations arising from treaties and other sources of international law". The word "origin" which has the same meaning, is not attended by the doubts and doctrinal debates the term "source" has provoked.

(4) According to article 12, the origin or provenance of an obligation does not, as such, alter the conclusion that responsibility will be entailed if it is breached by a State, nor does it, as such, affect the regime of State responsibility thereby arising. Obligations may arise for a State by a treaty and by a rule of customary international law or by a treaty and a unilateral act.[209] Moreover these various grounds of obligation interact with each other, as practice clearly shows. Treaties, especially multilateral treaties, can contribute to the formation of general international

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[208] Thus France undertook by a unilateral act not to engage in further atmospheric nuclear testing: *Nuclear Tests (Australia v. France), I.C.J. Reports 1974,* p. 253; *Nuclear Tests (New Zealand v. France), I.C.J. Reports 1974,* p. 457. The extent of the obligation thereby undertaken was clarified in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, I.C.J. Reports 1995,* p. 288.

[209] The International Court has recognized "[t]he existence of identical rules in international treaty law and customary law" on a number of occasions: see *North Sea Continental Shelf, I.C.J. Reports 1969,* p. 3, at pp. 38-39, para. 63; *Military and Paramilitary Activities, I.C.J. Reports 1986,* p. 14, at p. 95, para. 177.

law; customary law may assist in the interpretation of treaties; an obligation contained in a treaty may be applicable to a State by reason of its unilateral act, and so on. Thus international courts and tribunals have treated responsibility as arising for a State by reason of any "violation of a duty imposed by an international juridical standard".[210] In the *Rainbow Warrior* arbitration, the Tribunal said that "any violation by a State of any obligation, of whatever origin, gives rise to State responsibility and consequently, to the duty of reparation".[211] In the *Gabčikovo-Nagymaros Project* case, the International Court of Justice referred to the relevant draft article provisionally adopted by the Commission in 1976 in support of the proposition that it is "well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect".[212]

(5) Thus there is no room in international law for a distinction, such as is drawn by some legal systems, between the regime of responsibility for breach of a treaty and for breach of some other rule, i.e. for responsibility arising *ex contractu* or *ex delicto*. In the *Rainbow Warrior* arbitration, the Tribunal affirmed that "in the international law field there is no distinction between contractual and tortious responsibility".[213] As far as the origin of the obligation breached is concerned, there is a single general regime of State responsibility. Nor does any distinction exist between the "civil" and "criminal" responsibility as is the case in internal legal systems.

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[210] *Dickson Car Wheel Co.*, *UNRIAA*, vol. IV, p. 669 (1931), at p. 678; cf. *Goldenberg*, ibid., vol. II, p. 901 (1928), at pp. 908-909; *International Fisheries Co.*, ibid., vol. IV, p. 691 (1931), at p. 701 ("some principle of international law"); *Armstrong Cork Co.*, ibid., vol. XIV, p. 159 (1953), at p. 163 ("any rule whatsoever of international law").

[211] *Rainbow Warrior (New Zealand/France)*, *UNRIAA*, vol. XX, p. 217 (1990), at p. 251, para. 75. See also *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 46, para. 86 ("breach of an international obligation arising out of a treaty or a general rule of law").

[212] *I.C.J. Reports 1997*, p. 7, at p. 38, para. 47. The qualification "likely to be involved" may have been inserted because of possible circumstances precluding wrongfulness in that case.

[213] *UNRIAA*, vol. XX, p. 217 (1990), at p. 251, para. 75.

(6) State responsibility can arise from breaches of bilateral obligations or of obligations owed to some States or to the international community as a whole. It can involve relatively minor infringements as well as the most serious breaches of obligations under peremptory norms of general international law. Questions of the gravity of the breach and the peremptory character of the obligation breached can affect the consequences which arise for the responsible State and, in certain cases, for other States also. Certain distinctions between the consequences of certain breaches are accordingly drawn in Parts Two and Three of these Articles.[214] But the regime of State responsibility for breach of an international obligation under Part One is comprehensive in scope, general in character and flexible in its application: Part One is thus able to cover the spectrum of possible situations without any need for further distinctions between categories of obligation concerned or the category of the breach.

(7) Even fundamental principles of the international legal order are not based on any special source of law- or specific law-making procedure, in contract with rules of constitutional character in internal legal systems. In accordance with article 53 of the Vienna Convention on the Law of Treaties, a peremptory norm of general international law is one which is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[215] Article 53 recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as par excellence the holders of normative authority on behalf of the international community. Moreover, obligations imposed on States by peremptory norms necessarily affect the vital interests of the international community as a whole and may entail a stricter regime of responsibility than that applied to other internationally wrongful acts. But this is an issue belonging to the content of State responsibility.[216] So far at least as Part One of the Articles is concerned, there is a unitary regime of State responsibility which is general in character.

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[214] See chapter Two, Part III and commentary; see also article 48 and commentary.

[215] Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

[216] See articles 40-41 and commentaries.

(8) Rather similar considerations apply with respect to obligations arising under the Charter of the United Nations. Since the Charter is a treaty, the obligations it contains are, from the point of view of their origin, treaty obligations. The special importance of the Charter, as reflected in its Article 103,[217] derives from its express provisions as well as from the virtually universal membership of States in the United Nations.

(9) The general scope of the Articles extends not only to the conventional or other origin of the obligation breached but also to its subject matter. International awards and decisions specifying the conditions for the existence of an internationally wrongful act speak of the breach of an international obligation without placing any restriction on the subject-matter of the obligation breached.[218] Courts and tribunals have consistently affirmed the principle that there is no a priori limit to the subject matters on which States may assume international obligations. Thus the Permanent Court stated in its first judgment, in the *S.S. "Wimbledon"*, that "the right of entering into international engagements is an attribute of State sovereignty".[219] That proposition has often been endorsed.[220]

(10) In a similar perspective, it has sometimes been argued that an obligation dealing with a certain subject matter could only have been breached by conduct of the same description. That proposition formed the basis of an objection to the jurisdiction of the Court in the *Oil Platforms*

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[217] According to which "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, the obligations under the present Charter shall prevail."

[218] See, e.g., *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No.9*, p. 21; *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17*, p. 29; *Reparation for Injuries Suffered in the Service of the United Nations, I.C.J. Reports 1949*, p. 174, at p. 184. In these decisions it is stated that "any breach of an international engagement" entails international responsibility. See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, I.C.J. Reports 1950*, p. 221, at p. 228.

[219] *S.S. "Wimbledon", Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 25.

[220] See, e.g., *Nottebohm, Second Phase, I.C.J. Reports 1955*, p. 4, at pp. 20-21; *Right of Passage over Indian Territory, Merits, I.C.J. Reports 1960*, p. 6, at p. 33; *Military and Paramilitary Activities, I.C.J. Reports 1986*, p. 14, at p. 131, para. 259.

case.[221] It was argued that a treaty of friendship, commerce and navigation could not in principle have been breached by conduct involving the use of armed force. The Court responded in the following terms:

> "The Treaty of 1955 imposes on each of the Parties various obligations on a variety of matters. Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force are therefore not per se excluded from the reach of the Treaty of 1955."[222]

Thus the breach by a State of an international obligation constitutes an internationally wrongful act, whatever the subject matter or content of the obligation breached, and whatever description may be given to the non-conforming conduct.

(11) Article 12 also states that there is a breach of an international obligation when the act in question is not in conformity with what is required by that obligation, "regardless of its … character". In practice, various classifications of international obligations have been adopted. For example a distinction is commonly drawn between obligations of conduct and obligations of result. That distinction may assist in ascertaining when a breach has occurred. But it is not exclusive,[223] and it does not seem to bear specific or direct consequences as far as the present Articles are concerned. In the *Colozza* case,[224] for example, the European Court of Human Rights was concerned with the trial in absentia of a person who, without actual notice of his trial,

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[221] *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, I.C.J. Reports 1996*, p. 803.

[222] Ibid., at pp. 811-812, para. 21.

[223] Cf., *Gabčíkovo-Nagymaros Project, I.C.J. Reports 1997*, p. 7, at p. 77, para. 135, where the Court referred to the parties having accepted "obligations of conduct, obligations of performance, and obligations of result".

[224] *Colozza and Rubinat v. Italy, E.C.H.R., Series A, No. 89* (1985).

was sentenced to six years' imprisonment and was not allowed subsequently to contest his conviction. He claimed that he had not had a fair hearing, contrary to article 6 (1) of the European Convention. The Court noted that:

> "The Contracting States enjoy a wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of article 6 (1) in this field. The Court's task is not to indicate those means to the States, but to determine whether the result called for by the Convention has been achieved... For this to be so, the resources available under domestic law must be shown to be effective and a person 'charged with a criminal offence' ... must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure*."[225]

The Court thus considered that article 6 (1) imposed an obligation of result.[226] But, in order to decide whether there had been a breach of the Convention in the circumstances of the case, it did not simply compare the result required (the opportunity for a trial in the accused's presence) with the result practically achieved (the lack of that opportunity in the particular case). Rather it examined what more Italy could have done to make the applicant's right "effective".[227] The distinction between obligations of conduct and result was not determinative of the actual decision that there had been a breach of article 6 (1).[228]

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[225] Ibid., at pp. 15-16, para. 30, citing *De Cubber v. Belgium, E.C.H.R., Series A, No. 86* (1984), p. 20, para. 35.

[226] Cf. *Plattform 'Ärzte für das Leben' v. Austria*, in which the Court gave the following interpretation of article 11:

> "While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used ... In this area the obligation they enter into under article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved".

E.C.H.R., Series A, No. 139 (1988), p. 12, para. 34. In the *Colozza* case, the Court used similar language but concluded that the obligation was an obligation of result. Cf. C. Tomuschat, "What is a 'Breach' of the European Convention on Human Rights?", in Lawson & de Blois (eds.), *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers* (Dordrecht, Nijhoff, 1994), p. 315, at p. 328.

(12) The question often arises whether an obligation is breached by the enactment of legislation by a State, in cases where the content of the legislation prima facie conflicts with what is required by the international obligation, or whether the legislation has to be implemented in the given case before the breach can be said to have occurred. Again, no general rule can be laid down applicable to all cases.[229] Certain obligations may be breached by the mere passage of incompatible legislation.[230] Where this is so, the passage of the legislation without more entails the international responsibility of the enacting State, the legislature itself being an organ of the State for the purposes of the attribution of responsibility.[231] In other circumstances, the

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[227] *E.C.H.R., Series A, No. 89* (1985), at para. 28.

[228] See also *Islamic Republic of Iran v. United States of America, Cases A15 (IV) and A24,* (1998) 32 *Iran-U.S.C.T.R.,* 115.

[229] Cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, I.C.J. Reports 1988,* p. 12, at p. 30, para. 42.

[230] A uniform law treaty will generally be construed as requiring immediate implementation, i.e. as embodying an obligation to make the provisions of the uniform law a part of the law of each State party: see, e.g., B. Conforti, "Obblighi di mezzi e obblighi di risultato nelle convenzioni di diritto uniforme", *Rivista di diritto internazionale privato e processuale,* vol. 24 (1988), p. 233.

[231] See article 4 and commentary. For illustrations see, e. g., the findings of the European Court of Human Rights in *Norris v. Ireland, E.C.H.R., Series A, No. 142* (1988), para. 31, citing *Klass v. Germany, E.C.H.R., Series A, No. 28* (1978), at para. 33; *Marckx v. Belgium, E.C.H.R., Series A, No. 31* (1979), at para. 27; *Johnston v. Ireland, E.C.H.R., Series A, No. 112* (1986), at para. 33; *Dudgeon v. United Kingdom, E.C.H.R., Series A, No. 45* (1981), para. 41; *Modinos v. Cyprus, E.C.H.R., Series A, No. 259* (1993), at para. 24. See also Advisory Opinion OC-14/94, *International responsibility for the promulgation and enforcement of laws in violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Inter-Am.Ct.H.R., Series A, No. 14* (1994). The Inter-American Court also considered it possible to determine whether draft legislation was compatible with the provisions of human rights treaties: Advisory Opinion OC-3/83, *Restrictions to the Death Penalty (Arts. 4 (2) and 4 (4) of the American Convention on Human Rights), Inter-Am.Ct.H.R. Series A, No. 3* (1983).

enactment of legislation may not in and of itself amount to a breach,[232] especially if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question. In such cases, whether there is a breach will depend on whether and how the legislation is given effect.[233]

Article 13

International obligation in force for a State

> An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Commentary

(1) Article 13 states the basic principle that, for responsibility to exist, the breach must occur at a time when State is bound by the obligation. This is but the application in the field of State responsibility of the general principle of intertemporal law, as stated by Judge Huber in another context in the *Island of Palmas* case:

> "A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."[234]

Article 13 provides an important guarantee for States in terms of claims of responsibility. Its formulation ("does not constitute … unless …") is in keeping with the idea of a guarantee against the retrospective application of international law in matters of State responsibility.

(2) International tribunals have applied the principle stated in article 13 in many cases. An instructive example is provided by the decision of Umpire Bates of the United States-Great Britain Mixed Commission concerning the conduct of British authorities

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[232] As the International Court held in *LaGrand (Germany v. United States of America), Merits,* judgment of 27 June 2001, paras. 90-91.

[233] See, e.g., the report of the WTO Panel in United States - Sections 301-310 of the Trade Act of 1974, WT/DS152/R, 22 December 1999, paras. 7.34-7.57.

[234] *UNRIAA,* vol. II, p. 829 (1949), at p. 845. Generally on the intertemporal law see the Resolution of the Institute of International Law, *Annuaire de l'Institut de Droit International,* vol. 56 (1975), at pp. 536-540, for the debate, ibid., pp. 339-374; for Sørensen's reports, *Annuaire de l'Institut de Droit International,* vol. 55 (1973) pp. 1-116. See further, W. Karl, "The Time Factor in the Law of State Responsibility", in M. Spinedi and B. Simma (eds.), *United Nations Codification of State Responsibility* (New York, Oceana, 1987), p. 95.

who had seized American vessels engaged in the slave trade and freed slaves belonging to American nationals. The incidents referred to the Commission had taken place at different times and the umpire had to determine whether, at the time each incident took place, slavery was "contrary to the law of nations". Earlier incidents, dating back to a time when the slave trade was considered lawful, amounted to a breach on the part of the British authorities of the international obligation to respect and protect the property of foreign nationals.[235] The later incidents occurred when the slave trade had been "prohibited by all civilized nations" and did not involve the responsibility of Great Britain.[236]

(3) Similar principles were applied by Arbitrator Asser in deciding whether the seizure and confiscation by Russian authorities of United States vessels engaged in seal-hunting outside of Russia's territorial waters should be considered internationally wrongful. In his award in *The "James Hamilton Lewis"*,[237] he observed that the question had to be settled "according to the general principles of the law of nations and the spirit of the international agreements in force and binding upon the two High Parties at the time of the seizure of the vessel".[238] Since, under the principles in force at the time, Russia had no right to seize the American vessel, the seizure and confiscation of the vessel were unlawful acts for which Russia was required to pay compensation.[239] The same principle has consistently been applied by the European

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[235] See *The "Enterprize"*, (1855) de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. I, p. 703; Moore, *International Arbitrations*, vol. IV, p. 4349, at p. 4373. See also *The "Hermosa"* and *The "Créole"* cases, (1855) de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. I, pp. 703, 704; Moore, *International Arbitrations*, vol. IV, pp. 4374, 4375.

[236] See *The "Lawrence"*, (1855) de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. I, p. 740, at p. 741; Moore, *International Arbitrations*, vol. III, p. 2824. See also *The "Volusia"*, (1855) de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. I, p. 741.

[237] *UNRIAA*, vol. IX, p. 66 (1902).

[238] Ibid., at p. 69.

[239] Ibid. See also the case of *The "C.H. White"*, *UNRIAA*, vol. IX, p. 71 (1902), at p. 74. In these cases the arbitrator was required by the arbitration agreement itself to apply the law in force at the time the acts were performed. Nevertheless, the intention of the parties was clearly to confirm the application of the general principle in the context of the arbitration agreement, not to establish an exception. See also the *S.S. "Lisman"* case, ibid., vol. III, p. 1767 (1937), at p. 1771.

Commission and Court of Human Rights to deny claims relating to periods during which the European Convention for the Protection of Human Rights and Fundamental Freedoms was not in force for the State concerned.[240]

(4) State practice also supports the principle. A requirement that arbitrators apply the rules of international law in force at the time when the alleged wrongful acts took place is a common stipulation in arbitration agreements,[241] and undoubtedly is made by way of explicit confirmation of a generally recognized principle. International law writers who have dealt with the question recognize that the wrongfulness of an act must be established on the basis of the obligations in force at the time when the act was performed.[242]

(5) State responsibility can extend to acts of the utmost seriousness, and the regime of responsibility in such cases will be correspondingly stringent. But even when a new peremptory norm of general international law comes into existence, as contemplated by article 64 of the Vienna Convention on the Law of Treaties, this does not entail any retrospective assumption of responsibility. Article 71 (2) provides that such a new peremptory norm "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm".

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[240] See, e.g., *X v. Germany* (Application 1151/61) (1961), *Recueil des decisions de la Commission europeéne des droits de l'homme*, No. 7, p. 119 and many later decisions.

[241] See, e.g., the declarations exchanged between the United States and Russia for the submission to arbitration of certain disputes concerning the international responsibility of Russia for the seizure of American ships: *UNRIAA*., vol. IX, p. 57 (1900).

[242] See e.g. P. Tavernier, *Recherche sur l'application dans le temps des actes et des règles en droit international public* (Paris, L.G.D.J., 1970), pp. 119, 135, 292; D. Bindschedler-Robert, "De la rétroactivité en droit international public", *Recueil d'études de droit international public en hommage à Paul Guggenheim* (Geneva, Faculté de droit, Institut universitaire de hautes études internationales, 1968), p. 184; M. Sørensen, "Le problème intertemporel dans l'application de la Convention européenne des droits de l'homme", *Mélanges offerts à Polys Modinos* (Paris, Pedone, 1968), p. 304; T.O. Elias, "The Doctrine of Intertemporal Law", *A.J.I.L.*, vol. 74 (1980), p. 285; R. Higgins, "Time and the Law", *I.C.L.Q.*, vol. 46 (1997), p. 501.

(6) Accordingly it is appropriate to apply the intertemporal principle to all international obligations, and article 13 is general in its application. It is however without prejudice to the possibility that a State may agree to compensate for damage caused as a result of conduct which was not at the time a breach of any international obligation in force for that State. In fact cases of the retrospective assumption of responsibility are rare. The *lex specialis* principle (article 55) is sufficient to deal with any such cases where it may be agreed or decided that responsibility will be assumed retrospectively for conduct which was not a breach of an international obligation at the time it was committed.[243]

(7) In international law, the principle stated in article 13 is not only a necessary but also a sufficient basis for responsibility. In other words, once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law. Thus, as the International Court said in the *Northern Cameroons* case:

> "... if during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust".[244]

Similarly, in the *Rainbow Warrior* arbitration, the Arbitral Tribunal held that, although the relevant treaty obligation had terminated with the passage of time, France's responsibility for its earlier breach remained.[245]

(8) Both aspects of the principle are implicit in the decision of the International Court in *Certain Phosphate Lands in Nauru*. Australia argued there that a State responsibility claim relating to the period of its joint administration of the Trust Territory for Nauru (1947-1968)

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[243] As to the retroactive effect of the acknowledgement and adoption of conduct by a State, see article 11 and commentary, esp. para. (4). Such acknowledgement and adoption would not, without more, give retroactive effect to the obligations of the adopting State.

[244] *Northern Cameroons, Preliminary Objections, I.C.J. Reports 1963, P. 15, at p. 35.*

[245] *Rainbow Warrior (New Zealand/France), UNRIAA*, vol. XX, p. 217 (1990), at pp. 265-266.

could not be brought decades later, even if the claim had not been formally waived. The Court rejected the argument, applying a liberal standard of laches or unreasonable delay.[246] But it went on to say that:

> "it will be for the Court, in due time, to ensure that Nauru's delay in seising it will in no way cause prejudice to Australia with regard to both the establishment of the facts and the determination of the content of the applicable law."[247]

Evidently the Court intended to apply the law in force at the time the claim arose. Indeed that position was necessarily taken by Nauru itself, since its claim was based on a breach of the Trusteeship Agreement, which terminated at the date of its accession to independence in 1968. Its claim was that the responsibility of Australia, once engaged under the law in force at a given time, continued to exist even if the primary obligation had subsequently terminated.[248]

(9) The basic principle stated in article 13 is thus well-established. One possible qualification concerns the progressive interpretation of obligations, by a majority of the Court in the Namibia (*South West Africa*) advisory opinion.[249] But the intertemporal principle does not entail that treaty provisions are to be interpreted as if frozen in time. The evolutionary interpretation of treaty provisions is permissible in certain cases[250] but this has nothing to do with the principle that a State can only be held responsible for breach of an obligation which was in force for that State at the time of its conduct. Nor does the principle of the intertemporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant. For example, in dealing with the obligation to

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[246] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 240, at pp. 253-255, paras. 31-36. See article 45 (b) and commentary.

[247] *I.C.J. Reports 1992*, p. 240, at p. 255, para. 36.

[248] The case was settled before the Court had the opportunity to consider the merits: *I.C.J. Reports 1993*, p. 322; for the Settlement Agreement of 10 August 1993, see United Nations, *Treaty Series*, vol. 1770, p. 379.

[249] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p.16, at pp. 31-32, para. 53.

[250] See, e.g., the dictum of the European Court of Human Rights in *Tyrer v. United Kingdom, E.C.H.R., Series A, No. 26* (1978), at pp. 15-16.

ensure that persons accused are tried without undue delay, periods of detention prior to the entry into force of that obligation may be relevant as facts, even though no compensation could be awarded in respect of the period prior to the entry into force of the obligation.[251]

Article 14

Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Commentary

(1) The problem of identifying when a wrongful act begins and how long it continues is one which arises frequently[252] and has consequences in the field of State responsibility, including the important question of cessation of continuing wrongful acts dealt with in article 30. Although the existence and duration of a breach of an international obligation depends for the most part on the existence and content of the obligation and on the facts of the particular breach, certain basic

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[251] See, e.g., *Zana v. Turkey, E.C.H.R. Reports*, 1997-VII, p. 2533; J. Pauwelyn, "The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems", *B.Y.I.L.*, vol. 66 (1995), p. 415, at pp. 443-445.

[252] See, e.g., *Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A, No. 2,* p. 35; *Phosphates in Morocco, Preliminary Objections, 1938, P.C.I.J., Series A/B, No. 74,* p. 10, at pp. 23–29; *Electricity Company of Sofia and Bulgaria, 1939, P.C.I.J., Series A/B, No. 77,* p. 64, at pp. 80–82; *Right of Passage over Indian Territory, Merits, I.C.J. Reports 1960*, p. 6, at pp. 33 36. The issue has often been raised before the organs of the European Convention on Human Rights. See, e. g., the decision of the Commission in the *De Becker v. Belgium*, (1958 1959) *2 E.C.H.R. Yearbook*, p. 214, at pp. 234, 244; and the Court's judgments in *Ireland v. United Kingdom, E.C.H.R., Series A, No. 25* (1978), p. 64; *Papamichalopoulos and Others v. Greece, E.C.H.R., Series A, No. 260–B* (1993), para. 40; *Agrotexim v. Greece, E.C.H.R., Series A, No. 330-A* (1995), at p. 22, para. 58. See also E. Wyler, "Quelques réflexions sur la realisation dans le temps du fait internationalement illicite", *R.G.D.I.P.*, vol. 95 (1991), p. 881.

concepts are established. These are introduced in article 14. Without seeking to be comprehensive in its treatment of the problem, article 14 deals with several related questions. In particular it develops the distinction between breaches not extending in time and continuing wrongful acts (see paragraphs (1) and (2) respectively), and it also deals with the application of that distinction to the important case of obligations of prevention. In each of these cases it takes into account the question of the continuance in force of the obligation breached.

(2) Internationally wrongful acts usually take some time to happen. The critical distinction for the purpose of article 14 is between a breach which is continuing and one which has already been completed. In accordance with paragraph 1, a completed act occurs "at the moment when the act is performed", even though its effects or consequences may continue. The words "at the moment" are intended to provide a more precise description of the time-frame when a completed wrongful act is performed, without requiring that the act necessarily be completed in a single instant.

(3) In accordance with paragraph 2, a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period.[253] Examples of continuing wrongful acts include the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent.

(4) Whether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case. For example, the Inter-American Court of Human Rights has interpreted forced or involuntary disappearance as a continuing wrongful act, one which continues for as long as the person concerned is unaccounted for.[254] The question whether a wrongful taking of property is a completed or continuing act likewise depends to some extent on the content of the primary rule said to have been violated. Where an expropriation is carried out by legal process, with the consequence that title to the property

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[253] See above, article 13 and commentary, especially para. (2).

[254] *Blake, Inter-Am.Ct.H.R., Series C, No. 36* (1998), para. 67.

concerned is transferred, the expropriation itself will then be a completed act. The position with a de facto, "creeping" or disguised occupation, however, may well be different.[255] Exceptionally, a tribunal may be justified in refusing to recognize a law or decree at all, with the consequence that the resulting denial of status, ownership or possession may give rise to a continuing wrongful act.[256]

(5) Moreover, the distinction between completed and continuing acts is a relative one. A continuing wrongful act itself can cease: thus a hostage can be released, or the body of a disappeared person returned to the next of kin. In essence a continuing wrongful act is one which has been commenced but has not been completed at the relevant time. Where a continuing wrongful act has ceased, for example by the release of hostages or the withdrawal of forces from territory unlawfully occupied, the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue. In this respect it is covered by paragraph 1 of article 14.

(6) An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution, as required by Part Two of the Articles. The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.

(7) The notion of continuing wrongful acts is common to many national legal systems and owes its origins in international law to Triepel.[257] It has been repeatedly referred to by the

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[255] *Papamichalopoulos v. Greece, E.C.H.R., Series A, No. 260-B* (1993).

[256] *Loizidou v. Turkey, Merits, E.C.H.R. Reports* 1996-VI, p. 2216.

[257] H. Triepel, *Völkerrecht und Landesrecht* (Leipzig, Hirschfeld, 1899), p. 289. The concept was subsequently taken up in various general studies on State responsibility as well as in works on the interpretation of the formula "situations or facts prior to a given date" used in some declarations of acceptance of the compulsory jurisdiction of the International Court of Justice.

International Court and by other international tribunals. For example in the *Diplomatic and Consular Staff* case, the Court referred to "successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963".[258]

(8) The consequences of a continuing wrongful act will depend on the context, as well as on the duration of the obligation breached. For example, the *Rainbow Warrior* arbitration involved the failure of France to detain two agents on the French Pacific island of Hao for a period of three years, as required by an agreement between France and New Zealand. The Arbitral Tribunal referred with approval to the Commission's draft articles (now amalgamated in article 14) and to the distinction between instantaneous and continuing wrongful acts, and said:

> "Applying this classification to the present case, it is clear that the breach consisting in the failure of returning to Hao the two agents has been not only a material but also a continuous breach. And this classification is not purely theoretical, but, on the contrary, it has practical consequences, since the seriousness of the breach and its prolongation in time cannot fail to have considerable bearing on the establishment of the reparation which is adequate for a violation presenting these two features."[259]

The Tribunal went on to draw further legal consequences from the distinction in terms of the duration of French obligations under the agreement.[260]

(9) The notion of continuing wrongful acts has also been applied by the European Court of Human Rights to establish its jurisdiction *ratione temporis* in a series of cases. The issue arises because the Court's jurisdiction may be limited to events occurring after the respondent State became a party to the Convention or the relevant Protocol and accepted the right of individual petition. Thus in *Papamichalopoulos and Others v. Greece*, a seizure of property not involving formal expropriation occurred some eight years before Greece recognized the Court's

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[258] *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980,* p. 3, at p. 37, para. 80. See also p. 37, para. 78.

[259] *Rainbow Warrior (New Zealand/France), UNRIAA*, vol. XX, p. 217 (1990), at p. 264, para. 101.

[260] Ibid., at pp. 265-266, paras 105-106. But see the dissenting opinion of Sir Kenneth Keith, ibid., pp. 279-284.

competence. The Court held that there was a continuing breach of the right to peaceful enjoyment of property under article 1 of Protocol 1 to the Convention, which continued after the Protocol had come into force; it accordingly upheld its jurisdiction over the claim.[261]

(10) In *Loizidou v. Turkey*,[262] similar reasoning was applied by the Court to the consequences of the Turkish invasion of Cyprus in 1974, as a result of which the applicant was denied access to her property in northern Cyprus. Turkey argued that under article 159 of the Constitution of the Turkish Republic of Northern Cyprus of 1985, the property in question had been expropriated, and this had occurred prior to Turkey's acceptance of the Court's jurisdiction in 1990. The Court held that, in accordance with international law and having regard to the relevant Security Council resolutions, it could not attribute legal effect to the 1985 Constitution so that the expropriation was not completed at that time and the property continued to belong to the Applicant. The conduct of the TRNC and of Turkish troops in denying the applicant access to her property continued after Turkey's acceptance of the Court's jurisdiction, and constituted a breach of article 1 of Protocol 1 after that time.[263]

(11) The Human Rights Committee has likewise endorsed the idea of continuing wrongful acts. For example, in *Lovelace v. Canada*, it held it had jurisdiction to examine the continuing effects for the applicant of the loss of her status as a registered member of an Indian group, although the loss had occurred at the time of her marriage in 1970 and Canada only accepted the Committee's jurisdiction in 1976. The Committee noted that it was …

> "not competent, as a rule, to examine allegations relating to events having taken place before the entry into force of the Covenant and the Optional Protocol … In the case of Sandra Lovelace it follows that the Committee is not competent to express any view on the original cause of her loss of Indian status … at the time of her marriage in 1970 …

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[261] *Papamichalopoulos and Others v. Greece, E.C.H.R., Series A, No. 260–B* (1993).

[262] *Loizidou v. Turkey, Merits, E.C.H.R. Reports* 1996-VI, p. 2216.

[263] Ibid., at pp. 2230-2232, 2237-2238 paras. 41–47, 63–64. See however the dissenting judgment of Judge Bernhardt, ibid., 2242, para. 2 (with whom Judges Lopes Rocha, Jambrek, Pettiti, Baka and Gölcüklü in substance agreed). See also *Loizidou v. Turkey (Preliminary Objections) E.C.H.R., Series A, No. 310* (1995), at pp. 33-34, paras. 102-105; *Cyprus v. Turkey* (Application No. 25781/94), E.C.H.R., judgment of 10 May 2001.

> The Committee recognizes, however, that the situation may be different if the alleged violations, although relating to events occurring before 19 August 1976, continue, or have effects which themselves constitute violations, after that date."[264]

It found that the continuing impact of Canadian legislation, in preventing Lovelace from exercising her rights as a member of a minority, was sufficient to constitute a breach of article 27 of the Covenant after that date. Here the notion of a continuing breach was relevant not only to the Committee's jurisdiction but also to the application of article 27 as the most directly relevant provision of the Covenant to the facts in hand.

(12) Thus conduct which has commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can continue and give rise to a continuing wrongful act in the present. Moreover, this continuing character can have legal significance for various purposes, including State responsibility. For example, the obligation of cessation contained in article 30 applies to continuing wrongful acts.

(13) A question common to wrongful acts whether completed or continuing is when a breach of international law occurs, as distinct from being merely apprehended or imminent. As noted in the context of article 12, that question can only be answered by reference to the particular primary rule. Some rules specifically prohibit threats of conduct,[265] incitement or attempt,[266] in which case the threat, incitement or attempt is itself a wrongful act. On the other hand where the internationally wrongful act is the occurrence of some event - e.g. the diversion of an

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[264] *Lovelace v. Canada,* Communication No. R.6/24, *G.A.O.R., Thirty-sixth Session, Supplement No. 40* (A/36/40) (1981), p. 166, at p. 172, paras. 10-11.

[265] Notably, Article 2, paragraph 4, of the Charter of the United Nations prohibits the "threat or use of force against the territorial integrity or political independence of any State". For the question of what constitutes a threat of force, see *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996*, p. 226, at pp. 246–247, paras. 47–48; cf. R. Sadurska, "Threats of Force", *A.J.I.L.*, vol. 82 (1988), p. 239.

[266] A particularly comprehensive formulation is that of article III of the Genocide Convention of 1948, which prohibits conspiracy, direct and public incitement, attempt and complicity in relation to genocide. See too: article 2 of the International Convention for the Suppression of Terrorist Bombings of 1997, A/RES/52/164, and article 2 of the International Convention for the Suppression of the Financing of Terrorism of 1999, A/RES/54/109.

international river - mere preparatory conduct is not necessarily wrongful.[267] In the *Gabčikovo-Nagymaros Project* case, the question was when the diversion scheme ("Variant C") was put into effect. The Court held that the breach did not occur until the actual diversion of the Danube. It noted …

> "that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied. Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which 'does not qualify as a wrongful act'..."[268]

Thus the Court distinguished between the actual commission of a wrongful act and conduct of a preparatory character. Preparatory conduct does not itself amount to a breach if it does not "predetermine the final decision to be taken". Whether that is so in any given case will depend on the facts and on the content of the primary obligation. There will be questions of judgement and degree, which it is not possible to determine in advance by the use of any particular formula. The various possibilities are intended to be covered by the use of the term "occurs" in paragraphs 1 and 3 of article 14.

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[267] In some legal systems, the notion of "anticipatory breach" is used to deal with the definitive refusal by a party to perform a contractual obligation, in advance of the time laid down for its performance. Confronted with an anticipatory breach, the party concerned is entitled to terminate the contract and sue for damages. See K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (3rd edn.) (trans. J.A. Weir) (Oxford, Oxford University Press, 1998), p. 508. Other systems achieve similar results without using this concept, e.g. by construing a refusal to perform in advance of the time for performance as a "positive breach of contract": ibid., p. 494 (German law). There appears to be no equivalent in international law, but article 60 (3) (a) of the Vienna Convention on the Law of Treaties defines a material breach as including "a repudiation … not sanctioned by the present Convention". Such a repudiation could occur in advance of the time for performance.

[268] *Gabčikovo-Nagymaros Project, I.C.J. Reports 1997*, p. 7, at p. 54, para. 79, citing the draft commentary to what is now article 30.

(14) Paragraph 3 of article 14 deals with the temporal dimensions of a particular category of breaches of international obligations, namely the breach of obligations to prevent the occurrence of a given event. Obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur. The breach of an obligation of prevention may well be a continuing wrongful act, although, as for other continuing wrongful acts, the effect of article 13 is that the breach only continues if the State if bound by the obligation for the period during which the event continues and remains not in conformity with what is required by the obligation. For example, the obligation to prevent transboundary damage by air pollution, dealt with in the *Trail Smelter* arbitration,[269] was breached for as long as the pollution continued to be emitted. Indeed, in such cases the breach may be progressively aggravated by the failure to suppress it. However, not all obligations directed to preventing an act from occurring will be of this kind. If the obligation in question was only concerned to prevent the happening of the event in the first place (as distinct from its continuation), there will be no continuing wrongful act.[270] If the obligation in question has ceased, any continuing conduct by definition ceases to be wrongful at that time.[271] Both qualifications are intended to be covered by the phrase in paragraph 3, "and remains not in conformity with that obligation".

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[269] *UNRIAA*, vol. III, p. 1905 (1938, 1941).

[270] An example might be an obligation by State A to prevent certain information from being published. The breach of such an obligation will not necessarily be of a continuing character, since it may be that once the information is published, the whole point of the obligation is defeated.

[271] Cf. the *Rainbow Warrior* arbitration, *UNRIAA*, vol. XX, p. 217(1990), at p. 266.

Article 15

Breach consisting of a composite act

> 1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.
>
> 2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Commentary

(1) Within the basic framework established by the distinction between completed and continuing acts in article 14, article 15 deals with a further refinement, viz. the notion of a composite wrongful act. Composite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct.

(2) Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words their focus is "a series of acts or omissions defined in aggregate as wrongful". Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc. Some of the most serious wrongful acts in international law are defined in terms of their composite character. The importance of these obligations in international law justifies special treatment in article 15.[272]

(3) Even though it has special features, the prohibition of genocide, formulated in identical terms in the 1948 Convention and in later instruments,[273] may be taken as an illustration of a

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[272] See further J. Salmon, "Le fait étatique complexe: une notion contestable", *A.F.D.I.*, vol. XXVIII (1982), p. 709.

[273] See, e.g., art. 4 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993 (originally published as an Annex to S/25704 and Add.1, approved by the Security Council by Resolution 827 (1993); amended 13 May 1998 by Resolution 1166 (1998) and 30 November 2000 by Resolution 1329 (2000)); art. 2 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for such Violations Committed in

"composite" obligation. It implies that the responsible entity (including a State) will have adopted a systematic policy or practice. According to article II (a) of the Convention, the prime case of genocide is "killing members of [a national, ethnical, racial or religious group]" with the intent to destroy that group as such, in whole or in part. Both limbs of the definition contain systematic elements. Genocide also has to be carried out with the relevant intention, aimed at physically eliminating the group "as such". Genocide is not committed until there has been an accumulation of acts of killing, causing harm, etc., committed with the relevant intent, so as to satisfy the definition in article II. Once that threshold is crossed, the time of commission extends over the whole period during which any of the acts was committed, and any individual responsible for any of them with the relevant intent will have committed genocide.[274]

(4) It is necessary to distinguish composite obligations from simple obligations breached by a "composite" act. Composite acts may be more likely to give rise to continuing breaches, but simple acts can cause continuing breaches as well. The position is different, however, where the obligation itself is defined in terms of the cumulative character of the conduct, i.e. where the cumulative conduct constitutes the essence of the wrongful act. Thus apartheid is different in kind from individual acts of racial discrimination, and genocide is different in kind from individual acts even of ethnically or racially motivated killing.

(5) In *Ireland v. United Kingdom* Ireland complained of a practice of unlawful treatment of detainees in Northern Ireland which were said to amount to torture or inhuman or degrading treatment, and the case was held to be admissible on that basis. This had various procedural and remedial consequences. In particular, the exhaustion of local remedies rule did not have to be complied with in relation to each of the incidents cited as part of the practice. But the Court

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the Territory of Neighbouring States, 8 November 1994, approved by the Security Council by Resolution 955 (1994); and art. 6 of the Rome Statute of the International Criminal Court, 17 July 1998 (A/CONF.183/9).

[274] The intertemporal principle does not apply to the Genocide Convention, which according to article I of the Convention is declaratory. Thus the obligation to prosecute relates to genocide whenever committed. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996*, p. 595, at p. 617, para. 34.

denied that there was any separate wrongful act of a systematic kind involved. It was simply that Ireland was entitled to complain of a practice made up by a series of breaches of article 7 of the Convention, and to call for its cessation. As the Court said:

> "A practice incompatible with the Convention consists of an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or system; *a practice does not of itself constitute a violation separate from such breaches* ... The concept of practice is of particular importance for the operation of the rule of exhaustion of domestic remedies. This rule, as embodied in article 26 of the Convention, applies to State applications ... in the same way as it does to 'individual' applications ... On the other hand and in principle, the rule does not apply where the applicant State complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Commission or the Court to give a decision on each of the cases put forward as proof or illustrations of that practice."[275]

In the case of crimes against humanity, the composite act is a violation separate from the individual violations of human rights of which it is composed.

(6) A further distinction must be drawn between the necessary elements of a wrongful act and what might be required by way of evidence or proof that such an act has occurred. For example, an individual act of racial discrimination by a State is internationally wrongful,[276] even though it may be necessary to adduce evidence of a series of acts by State officials (involving the same person or other persons similarly situated) in order to show that any one of those acts was discriminatory rather than actuated by legitimate grounds. In its essence such discrimination is not a composite act, but it may be necessary for the purposes of proving it to produce evidence of a practice amounting to such an act.

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[275] *E.C.H.R., Series A, No. 25* (1978), at p. 64, para. 159 (emphasis added); see also ibid., at p. 63, para. 157. See also the United States counterclaim in *Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, I.C.J. Reports 1998*, p. 190, which likewise focuses on a general situation rather than specific instances.

[276] See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, United Nations, *Treaty Series*, vol. 660, p. 195, art. 2; International Covenant on Civil and Political Rights, United Nations *Treaty Series*, vol. 999, p. 171, art. 26.

(7) A consequence of the character of a composite act is that the time when the act is accomplished cannot be the time when the first action or omission of the series takes place. It is only subsequently that the first action or omission will appear as having, as it were, inaugurated the series. Only after a series of actions or omissions takes place will the composite act be revealed, not merely as a succession of isolated acts, but as a composite act, i.e. an act defined in aggregate as wrongful.

(8) Paragraph 1 of article 15 defines the time at which a composite act "occurs" as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series. Similar considerations apply as for completed and continuing wrongful acts in determining when a breach of international law exists; the matter is dependent upon the precise facts and the content of the primary obligation. The number of actions or omissions which must occur to constitute a breach of the obligation, is also determined by the formulation and purpose of the primary rule. The actions or omissions must be part of a series but the article does not require that the whole series of wrongful acts has to be committed in order to fall into the category of a composite wrongful act, provided a sufficient number of acts has occurred to constitute a breach. At the time when the act occurs which is sufficient to constitute the breach it may not be clear that further acts are to follow and that the series is not complete. Further, the fact that the series of actions or omissions was interrupted so that it was never completed will not necessarily prevent those actions or omissions which have occurred being classified as a composite wrongful act if, taken together, they are sufficient to constitute the breach.

(9) While composite acts are made up of a series of actions or omissions defined in aggregate as wrongful, this does not exclude the possibility that every single act in the series could be wrongful in accordance with another obligation. For example the wrongful act of genocide is generally made up of a series of acts which are themselves internationally wrongful. Nor does it affect the temporal element in the commission of the acts: a series of acts or omissions may occur at the same time or sequentially, at different times.

(10) Paragraph 2 of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but

at that point the act should be regarded as having occurred over the whole period from the commission of the first action or omission. If this were not so, the effectiveness of the prohibition would thereby be undermined.

(11) The word "remain" in paragraph 2 is inserted to deal with the intertemporal principle set out in article 13. In accordance with that principle, the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the "first" of the actions or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence. This need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent).

Chapter IV

Responsibility of a State in connection with the act of another State

(1) In accordance with the basic principles laid down in chapter I, each State is responsible for its own internationally wrongful conduct, i.e. for conduct attributable to it under chapter II which is in breach of an international obligation of that State in accordance with chapter III.[277] The principle that State responsibility is specific to the State concerned underlies the present Articles as a whole. It will be referred to as the principle of independent responsibility. It is appropriate since each State has its own range of international obligations and its own correlative responsibilities.

(2) However, internationally wrongful conduct often results from the collaboration of several States rather than of one State acting alone.[278] This may involve independent conduct by several States, each playing its own role in carrying out an internationally wrongful act. Or it may be

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[277] See especially article 2 and commentary.

[278] See M.L. Padelletti, *Pluralità di Stati nel Fatto Illecito Internazionale* (Milan, Giuffrè, 1990); I. Brownlie, *System of the Law of Nations: State Responsibility (Part I)* (Oxford, Clarendon Press, 1983), pp. 189-192; J. Quigley, "Complicity in International Law: A New Direction in the Law of State Responsibility", *B.Y.I.L.*, vol. 57 (1986), p. 77; J.E. Noyes & B.D. Smith, "State Responsibility and the Principle of Joint and Several Liability", *Yale Journal of International Law,* vol. 13 (1988), p. 225; B. Graefrath, "Complicity in the Law of International Responsibility", *Revue belge de droit international,* vol. 29 (1996), p. 370.

that a number of States act through a common organ to commit a wrongful act.[279] Internationally wrongful conduct can also arise out of situations where a State acts on behalf of another State in carrying out the conduct in question.

(3) Various forms of collaborative conduct can coexist in the same case. For example, three States, Australia, New Zealand and the United Kingdom, together constituted the Administering Authority for the Trust Territory of Nauru. In *Certain Phosphate Lands in Nauru* proceedings were commenced against Australia alone in respect of acts performed on the "joint behalf" of the three States.[280] The acts performed by Australia involved both "joint" conduct of several States and day-to-day administration of a territory by one State acting on behalf of other States as well as on its own behalf. By contrast, if the relevant organ of the acting State is merely "placed at the disposal" of the requesting State, in the sense provided for in article 6, only the requesting State is responsible for the act in question.

(4) In certain circumstances the wrongfulness of a State's conduct may depend on the independent action of another State. A State may engage in conduct in a situation where another State is involved and the conduct of the other State may be relevant or even decisive in assessing whether the first State has breached its own international obligations. For example in the *Soering* case the European Court of Human Rights held that the proposed extradition of a person to a State not party to the European Convention where he was likely to suffer inhuman or degrading treatment or punishment involved a breach of article 3 of the Convention by the extraditing State.[281] Alternatively a State may be required by its own international obligations to prevent certain conduct by another State, or at least to prevent the harm that would flow from

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[279] In some cases the act in question may be committed by the organs of an international organization. This raises issues of the international responsibility of international organizations which fall outside the scope of the present articles. See article 57 and commentary.

[280] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 240, at p. 258, para. 47; see also the separate opinion of Judge Shahabuddeen, ibid., p. 284.

[281] *Soering v. United Kingdom, E.C.H.R., Series A, No. 161 (1989)*, at pp. 33-36, paras. 85-91. See also *Cruz Varas v. Sweden, E.C.H.R., Series A, No. 201 (1991)*, at p. 28, paras. 69-70; *Vilvarajah v. United Kingdom, E.C.H.R., Series A, No. 215 (1991)*, at p. 37, paras. 115-116.

such conduct. Thus the basis of responsibility in the *Corfu Channel* case[282] was Albania's failure to warn the United Kingdom of the presence of mines in Albanian waters which had been laid by a third State. Albania's responsibility in the circumstances was original and not derived from the wrongfulness of the conduct of any other State.

(5) In most cases of collaborative conduct by States, responsibility for the wrongful act will be determined according to the principle of independent responsibility referred to in paragraph (1) above. But there may be cases where conduct of the organ of one State, not acting as an organ or agent of another State, is nonetheless chargeable to the latter State, and this may be so even though the wrongfulness of the conduct lies, or at any rate primarily lies, in a breach of the international obligations of the former. Chapter IV of Part One defines these exceptional cases where it is appropriate that one State should assume responsibility for the internationally wrongful act of another.

(6) Three situations are covered in chapter IV. Article 16 deals with cases where one State provides aid or assistance to another State with a view to assisting in the commission of a wrongful act by the latter. Article 17 deals with cases where one State is responsible for the internationally wrongful act of another State because it has exercised powers of direction and control over the commission of an internationally wrongful act by the latter. Article 18 deals with the extreme case where one State deliberately coerces another into committing an act which is, or but for the coercion would be,[283] an internationally wrongful act on the part of the coerced State. In all three cases, the act in question is still committed, voluntarily or otherwise, by organs or agents of the acting State, and is or, but for the coercion, would be a breach of that State's international obligations. The implication of the second State in that breach arises from the special circumstance of its willing assistance in, its direction and control over or its coercion of the acting State. But there are important differences between the three cases. Under article 16, the State primarily responsible is the acting State and the assisting State has a merely supporting role. Similarly under article 17, the acting State commits the internationally wrongful act, albeit

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[282] *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 4, at p. 22.

[283] If a State has been coerced, the wrongfulness of its act may be precluded by *force majeure*: see article 23 and commentary.

under the direction and control of another State. By contrast, in the case of coercion under article 18, the coercing State is the prime mover in respect of the conduct and the coerced State is merely its instrument.

(7) A feature of this chapter is that it specifies certain conduct as internationally wrongful. This may seem to blur the distinction maintained in the articles between the primary or substantive obligations of the State and its secondary obligations of responsibility.[284] It is justified on the basis that responsibility under chapter IV is in a sense derivative.[285] In national legal systems, rules dealing, for example, with conspiracy, complicity and inducing breach of contract may be classified as falling within the "general part" of the law of obligations. Moreover, the idea of the implication of one State in the conduct of another is analogous to problems of attribution, dealt with in chapter II.

(8) On the other hand, the situations covered in chapter IV have a special character. They are exceptions to the principle of independent responsibility and they only cover certain cases. In formulating these exceptional cases where one State is responsible for the internationally wrongful acts of another, it is necessary to bear in mind certain features of the international system. First, there is the possibility that the same conduct may be internationally wrongful so far as one State is concerned but not for another State having regard to its own international obligations. Rules of derived responsibility cannot be allowed to undermine the principle, stated in article 34 of the Vienna Convention on the Law of Treaties, that a treaty "does not create either obligations or rights for a third State without its consent"; similar issues arise with respect to unilateral obligations and even, in certain cases, rules of general international law. Hence it is only in the extreme case of coercion that a State may become responsible under this chapter for conduct which would not have been internationally wrongful if performed by that State. Secondly, States engage in a wide variety of activities through a multiplicity of organs and agencies. For example, a State providing financial or other aid to another State should not be required to assume the risk that the latter will divert the aid for purposes which may be

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[284] See above, Introduction to the articles, paras. (1), (2), (4) for an explanation of the distinction.

[285] Cf. the term "responsabilité dérivée" used by Arbitrator Huber in *British Claims in the Spanish Zone of Morocco*, *UNRIAA*, vol. II, p. 615 (1924), at p. 648.

internationally unlawful. Thus it is necessary to establish a close connection between the action of the assisting, directing or coercing State on the one hand and that of the State committing the internationally wrongful act on the other. Thus the articles in this Part require that the former State should be aware of the circumstances of the internationally wrongful act in question, and establish a specific causal link between that act and the conduct of the assisting, directing or coercing State. This is done without prejudice to the general question of "wrongful intent" in matters of State responsibility, on which the articles are neutral.[286]

(9) Similar considerations dictate the exclusion of certain situations of "derived responsibility" from chapter IV. One of these is incitement. The incitement of wrongful conduct is generally not regarded as sufficient to give rise to responsibility on the part of the inciting State, if it is not accompanied by concrete support or does not involve direction and control on the part of the inciting State.[287] However, there can be specific treaty obligations prohibiting incitement under certain circumstances.[288] Another concerns the issue which is described in some systems of internal law as being an "accessory after the fact". It seems that there is no general obligation on the part of third States to cooperate in suppressing internationally wrongful conduct of another State which may already have occurred. Again it is a matter for specific treaty obligations to establish any such obligation of suppression after the event. There are, however, two important qualifications here. First, in some circumstances assistance given by one State to another after the latter has committed an internationally wrongful act may amount to the adoption of that act by the former State. In such cases responsibility for that act potentially arises pursuant to article 11. Secondly, special obligations of cooperation in putting an end to an

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[286] See above, commentary to article 2, paras. (3) and (10).

[287] See the statement of the United States-French Commissioners relating to the *French Indemnity of 1831,* in Moore, *International arbitrations,* vol. V, p. 4399, at pp. 4473-4476. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986*, p. 14, at p. 129, para. 255, and the dissenting opinion of Judge Schwebel, ibid., p. 379, para. 259.

[288] Cf., e.g., art. III (c) of the Convention on the Prevention and Punishment of the Crime of Genocide, United Nations, *Treaty Series,* vol. 78, p. 277; art. 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, vol. 660, p. 195.

unlawful situation arise in the case of serious breaches of obligations under peremptory norms of general international law. By definition, in such cases States will have agreed that no derogation from such obligations is to be permitted and, faced with a serious breach of such an obligation, certain obligations of cooperation arise. These are dealt with in article 41.

Article 16

Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

Commentary

(1) Article 16 deals with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter. Such situations arise where a State voluntarily assists or aids another State in carrying out conduct which violates the international obligations of the latter, for example, by knowingly providing an essential facility or financing the activity in question. Other examples include providing means for the closing of an international waterway, facilitating the abduction of persons on foreign soil, or assisting in the destruction of property belonging to nationals of a third country. The State primarily responsible in each case is the acting State, and the assisting State has only a supporting role. Hence the use of the term "by the latter" in the chapeau to article 16, which distinguishes the situation of aid or assistance from that of co-perpetrators or co-participants in an internationally wrongful act. Under article 16, aid or assistance by the assisting State is not to be confused with the responsibility of the acting State. In such a case, the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.

(2) Various specific substantive rules exist, prohibiting one State from providing assistance in the commission of certain wrongful acts by other States or even requiring third States to prevent or repress such acts.[289] Such provisions do not rely on any general principle of derived responsibility, nor do they deny the existence of such a principle, and it would be wrong to infer from them the non-existence of any general rule. As to treaty provisions such as Article 2, paragraph (5) of the United Nations Charter, again these have a specific rationale which goes well beyond the scope and purpose of article 16.

(3) Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.

(4) The requirement that the assisting State be aware of the circumstances making the conduct of the assisted State internationally wrongful is reflected by the phrase "knowledge of the circumstances of the internationally wrongful act". A State providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act. If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.

(5) The second requirement is that the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. This limits the application of article 16 to those cases where the aid or assistance given is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.

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[289] See, e.g., G.A. Res. 2625 (XXV) of 24 October 1970, first principle, para. 9; G.A. Res. 3314 (XXIX), annex, para. 3 (f).

(6) The third condition limits article 16 to aid or assistance in the breach of obligations by which the aiding or assisting State is itself bound. An aiding or assisting State may not deliberately procure the breach by another State of an obligation by which both States are bound; a State cannot do by another what it cannot do by itself. On the other hand, a State is not bound by obligations of another State vis-à-vis third States. This basic principle is also embodied in articles 34 and 35 of the Vienna Convention on the Law of Treaties.[290] Correspondingly, a State is free to act for itself in a way which is inconsistent with obligations of another State vis-à-vis third States. Any question of responsibility in such cases will be a matter for the State to whom assistance is provided vis-à-vis the injured State. Thus it is a necessary requirement for the responsibility of an assisting State that the conduct in question, if attributable to the assisting State, would have constituted a breach of its own international obligations.

(7) State practice supports assigning international responsibility to a State which deliberately participates in the internationally wrongful conduct of another through the provision of aid or assistance, in circumstances where the obligation breached is equally opposable to the assisting State. For example, in 1984 Iran protested against the supply of financial and military aid to Iraq by the United Kingdom, which allegedly included chemical weapons used in attacks against Iranian troops, on the ground that the assistance was facilitating acts of aggression by Iraq.[291] The British Government denied both the allegation that it had chemical weapons and that it had supplied them to Iraq.[292] In 1998, a similar allegation surfaced that Sudan had assisted Iraq to manufacture chemical weapons by allowing Sudanese installations to be used by Iraqi technicians for steps in the production of nerve gas. The allegation was denied by Iraq's representative to the United Nations.[293]

(8) The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State. An example is provided by a statement made by the Government of the Federal Republic

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[290] Vienna Convention on the Law of Treaties, United Nations, *Treaty Series,* 1155, p. 331.

[291] See *New York Times*, 6 March 1984, p. A1, col. 1.

[292] See *New York Times*, 5 March 1984, p. A3, col. 1.

[293] See *New York Times*, 26 August 1998, p. A8, col. 1.

of Germany in response to an allegation that Germany had participated in an armed attack by allowing United States military aircraft to use airfields in its territory in connection with the United States intervention in Lebanon. While denying that the measures taken by the United States and the United Kingdom in the Near East constituted intervention, the Federal Republic of Germany nevertheless seems to have accepted that the act of a State in placing its own territory at the disposal of another State in order to facilitate the commission of an unlawful use of force by that other State was itself an internationally wrongful act.[294] Another example arises from the Tripoli bombing incident in April 1986. Libya charged the United Kingdom with responsibility for the event, based on the fact that the United Kingdom had allowed several of its air bases to be used for the launching of American fighter planes to attack Libyan targets.[295] Libya asserted that the United Kingdom "would be held partly responsible" for having "supported and contributed in a direct way" to the raid.[296] The United Kingdom denied responsibility on the basis that the raid by the United States was lawful as an act of self-defence against Libyan terrorist attacks on American targets.[297] A proposed Security Council resolution concerning the attack was vetoed, but the United Nations General Assembly issued a resolution condemning the "military attack" as "a violation of the Charter of the United Nations and of international law", and calling upon all States "to refrain from extending any assistance or facilities for perpetrating acts of aggression against the Libyan Arab Jamahiriya".[298]

(9) The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it assists another State to circumvent sanctions

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[294] For the text of the note see *Z.a.ö.R.V.*, vol. 20 (1960), pp. 663-664.

[295] See United States of America, *Department of State Bulletin*, No. 2111, June 1986, p. 8.

[296] See the statement of Ambassador Hamed Houdeiry, Libyan People's Bureau, Paris, *The Times*, 16 April 1986, p. 6, col. 7.

[297] Statement of Mrs. Margaret Thatcher, Prime Minister, *House of Commons Debates*, 6th series, vol. 95, col. 737 (15 April 1986), reprinted in *B.Y.I.L.*, vol. 57 (1986), p. 638.

[298] See G.A. Res. 41/38 of 20 November 1986, paras. 1, 3.

imposed by the United Nations Security Council[299] or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the United Nations General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.[300] Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.

(10) In accordance with article 16, the assisting State is responsible for its own act in deliberately assisting another State to breach an international obligation by which they are both bound. It is not responsible, as such, for the act of the assisted State. In some cases this may be a distinction without a difference: where the assistance is a necessary element in the wrongful act in absence of which it could not have occurred, the injury suffered can be concurrently attributed to the assisting and the acting State.[301] In other cases, however, the difference may be very material: the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered. By assisting another State to commit an internationally wrongful act, a State should not necessarily be held to indemnify the victim for all the consequences of the act, but only for those which, in accordance with the principles stated in Part Two of the articles, flow from its own conduct.

(11) Article 16 does not address the question of the admissibility of judicial proceedings to establish the responsibility of the aiding or assisting State in the absence of or without the consent of the aided or assisted State. The International Court has repeatedly affirmed that it cannot decide on the international responsibility of a State if, in order to do so, "it would have to

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[299] See, e.g., Report by President Clinton, *A.J.I.L.*, vol. 91 (1997), p. 709.

[300] *Report of the Economic and Social Council, Report of the Third Committee of the General Assembly,* draft resolution XVII, 14 December 1982, A/37/745, p. 50.

[301] For the question of concurrent responsibility of several States for the same injury see article 47 and commentary.

rule, as a prerequisite, on the lawfulness"[302] of the conduct of another State, in the latter's absence and without its consent. This is the so-called *Monetary Gold* principle.[303] That principle may well apply to cases under article 16, since it is of the essence of the responsibility of the aiding or assisting State that the aided or assisted State itself committed an internationally wrongful act. The wrongfulness of the aid or assistance given by the former is dependent, *inter alia*, on the wrongfulness of the conduct of the latter. This may present practical difficulties in some cases in establishing the responsibility of the aiding or assisting State, but it does not vitiate the purpose of article 16. The *Monetary Gold* principle is concerned with the admissibility of claims in international judicial proceedings, not with questions of responsibility as such. Moreover that principle is not all-embracing, and the *Monetary Gold* principle may not be a barrier to judicial proceedings in every case. In any event, wrongful assistance given to another State has frequently led to diplomatic protests. States are entitled to assert complicity in the wrongful conduct of another State even though no international court may have jurisdiction to rule on the charge, at all or in the absence of the other State.

Article 17

Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Commentary

(1) Article 17 deals with a second case of derived responsibility, the exercise of direction and control by one State over the commission of an internationally wrongful act by another. Under article 16 a State providing aid or assistance with a view to the commission of an internationally

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[302] *East Timor (Portugal v. Australia), I.C.J. Reports 1995*, p. 90, at p. 105, para. 35.

[303] *Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954*, p. 19, at p. 32; *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 240, at p. 261, para. 55.

wrongful act incurs international responsibility only to the extent of the aid or assistance given. By contrast, a State which directs and controls another in the commission of an internationally wrongful act is responsible for the act itself, since it controlled and directed the act in its entirety.

(2) Some examples of international responsibility flowing from the exercise of direction and control over the commission of a wrongful act by another State are now largely of historical significance. International dependency relationships such as "suzerainty" or "protectorate" warranted treating the dominant State as internationally responsible for conduct formally attributable to the dependent State. For example, in *Rights of Nationals of the United States in Morocco*,[304] France commenced proceedings under the Optional Clause in respect of a dispute concerning the rights of United States nationals in Morocco under French protectorate. The United States objected that any eventual judgment might not be considered as binding upon Morocco, which was not a party to the proceedings. France confirmed that it was acting both in its own name and as the protecting power over Morocco, with the result that the Court's judgment would be binding both on France and on Morocco,[305] and the case proceeded on that basis.[306] The Court's judgment concerned questions of the responsibility of France in respect of the conduct of Morocco which were raised both by the Application and by the United States counter-claim.

(3) With the developments in international relations since 1945, and in particular the process of decolonization, older dependency relationships have been terminated. Such links do not involve any legal right to direction or control on the part of the representing State. In cases of representation, the represented entity remains responsible for its own international obligations, even though diplomatic communications may be channelled through another State. The representing State in such cases does not, merely because it is the channel through which

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[304] *Rights of Nationals of the United States of America in Morocco, I.C.J. Reports 1952*, p. 176.

[305] See *I.C.J. Pleadings, Rights of Nationals of the United States of America in Morocco*, vol. I, p. 235; ibid., vol. II, pp. 431-433; the United States thereupon withdrew its preliminary objection: ibid., p. 434.

[306] See *Rights of Nationals of the United States of America in Morocco, I.C.J. Reports 1952*, p. 176, at p. 179.

communications pass, assume any responsibility for their content. This is not in contradiction to the *British Claims in the Spanish Zone of Morocco* arbitration, which affirmed that "the responsibility of the protecting State … proceeds from the fact that the protecting State alone represents the protected territory in its international relations,"[307] and that the protecting State is answerable "in place of the protected State."[308] The principal concern in the arbitration was to ensure that, in the case of a protectorate which put an end to direct international relations by the protected State, international responsibility for wrongful acts committed by the protected State was not erased to the detriment of third States injured by the wrongful conduct. The acceptance by the protecting State of the obligation to answer in place of the protected State was viewed as an appropriate means of avoiding that danger.[309] The justification for such an acceptance was not based on the relationship of "representation" as such but on the fact that the protecting State was in virtually total control over the protected State. It was not merely acting as a channel of communication.

(4) Other relationships of dependency, such as dependent territories fall entirely outside the scope of article 17, which is concerned only with the responsibility of one State for the conduct of another State. In most relationships of dependency between one territory and another, the dependent territory, even if it may possess some international personality, is not a State. Even in cases where a component unit of a federal State enters into treaties or other international legal relations in its own right, and not by delegation from the federal State, the component unit is not itself a State in international law. So far as State responsibility is concerned, the position of federal States is no different from that of any other States: the normal principles specified in articles 4 to 9 of the draft articles apply, and the federal State is internationally responsible for the conduct of its component units even though that conduct falls within their own local control under the federal constitution.[310]

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[307] *British Claims in the Spanish Zone of Morocco*, *UNRIAA*, vol. II, p. 615 (1925), at p. 649 (translation).

[308] Ibid., at p. 648.

[309] Ibid.

[310] See, e.g., *LaGrand (Germany v. United States of America), Provisional Measures, I.C.J. Reports 1999,* p. 9, at p. 16, para. 28.

(5) Nonetheless, instances exist or can be envisaged where one State exercises the power to direct and control the activities of another State, whether by treaty or as a result of a military occupation or for some other reason. For example, during the belligerent occupation of Italy by Germany in the Second World War, it was generally acknowledged that the Italian police in Rome operated under the control of the occupying Power. Thus the protest by the Holy See in respect of wrongful acts committed by Italian police who forcibly entered the Basilica of St. Paul in Rome in February 1944 asserted the responsibility of the German authorities.[311] In such cases the occupying State is responsible for acts of the occupied State which it directs and controls.

(6) Article 17 is limited to cases where a dominant State actually directs and controls conduct which is a breach of an international obligation of the dependent State. International tribunals have consistently refused to infer responsibility on the part of a dominant State merely because the latter may have the power to interfere in matters of administration internal to a dependent State, if that power is not exercised in the particular case. In the *Robert E. Brown* case,[312] for example, the Arbitral Tribunal held that the authority of Great Britain, as suzerain over the South African Republic prior to the Boer War, "fell far short of what would be required to make her responsible for the wrong inflicted upon Brown."[313] It went on to deny that Great Britain possessed power to interfere in matters of internal administration and continued that there was no evidence "that Great Britain ever did undertake to interfere in this way."[314] Accordingly the relation of suzerainty "did not operate to render Great Britain liable for the acts complained of."[315] In the *Heirs of the Duc de Guise* case,[316] the Franco-Italian Conciliation Commission held that Italy was responsible for a requisition carried out by Italy in Sicily at a

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[311] See R. Ago, "L'occupazione bellica di Roma e il Trattato lateranense", *Comunicazioni e Studi* (Milan, Giuffré, 1946), vol. II, pp. 167-168.

[312] *Brown (United States) v. Great Britain, UNRIAA*, vol. VI, p. 120 (1923).

[313] Ibid., at p. 130.

[314] Ibid., at p. 131.

[315] Ibid.

[316] *Heirs of the Duc de Guise, UNRIAA*, vol. XIII, p. 150 (1951).

time when it was under Allied occupation. Its decision was not based on the absence of Allied power to requisition the property, or to stop Italy from doing so. Rather the majority pointed to the absence in fact of any "intermeddling on the part of the Commander of the Occupation forces or any Allied authority calling for the requisition decrees".[317] The mere fact that a State may have power to exercise direction and control over another State in some field is not a sufficient basis for attributing to it any wrongful acts of the latter State in that field.[318]

(7) In the formulation of article 17, the term "controls" refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern. Similarly, the word "directs" does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind. Both direction and control must be exercised over the wrongful conduct in order for a dominant State to incur responsibility. The choice of the expression, common in English, "*direction and control*", raised some problems in other languages, owing in particular to the ambiguity of the term "*direction*" which may imply, as is the case in French, complete power, whereas it does not have this implication in English.

(8) Two further conditions attach to responsibility under article 17. First, the dominant State is only responsible if it has knowledge of the circumstances making the conduct of the dependent State wrongful. Secondly, it has to be shown that the completed act would have been wrongful had it been committed by the directing and controlling State itself. This condition is significant in the context of bilateral obligations, which are not opposable to the directing State. In cases of multilateral obligations and especially of obligations to the international community, it is of much less significance. The essential principle is that a State should not be able to do through another what it could not do itself.

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[317] Ibid., p. 161. See also, in another context, *Drodz & Janousek v. France & Spain, E.C.H.R., Series A, No. 240* (1992); see also *Iribarne Pérez v. France, E.C.H.R., Series A, No. 325-C* (1995), at pp. 62-63, paras. 29-31.

[318] It may be that the fact of the dependence of one State upon another is relevant in terms of the burden of proof, since the mere existence of a formal State apparatus does not exclude the possibility that control was exercised in fact by an occupying Power. Cf. *Restitution of Household Effects Belonging to Jews Deported from Hungary (Germany)* (Kammergericht, Berlin) (1965), *I.L.R.*, vol. 44, p. 301, at pp. 340-342.

(9) As to the responsibility of the directed and controlled State, the mere fact that it was directed to carry out an internationally wrongful act does not constitute an excuse under chapter V of Part One. If the conduct in question would involve a breach of its international obligations, it is incumbent upon it to decline to comply with the direction. The defence of "superior orders" does not exist for States in international law. This is not to say that the wrongfulness of the directed and controlled State's conduct may not be precluded under chapter V, but this will only be so if it can show the existence of a circumstance precluding wrongfulness, e.g. *force majeure*. In such a case it is to the directing State alone that the injured State must look. But as between States, genuine cases of *force majeure* or coercion are exceptional. Conversely it is no excuse for the directing State to show that the directed State was a willing or even enthusiastic participant in the internationally wrongful conduct, if in truth the conditions laid down in article 17 are met.

Article 18

Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(b) The coercing State does so with knowledge of the circumstances of the act.

Commentary

(1) The third case of derived responsibility dealt with by chapter IV is that of coercion of one State by another. Article 18 is concerned with the specific problem of coercion deliberately exercised in order to procure the breach of one State's obligation to a third State. In such cases the responsibility of the coercing State with respect to the third State derives not from its act of coercion, but rather from the wrongful conduct resulting from the action of the coerced State. Responsibility for the coercion itself is that of the coercing State vis-à-vis the coerced State, whereas responsibility under article 18 is the responsibility of the coercing State vis-à-vis a victim of the coerced act, in particular a third State which is injured as a result.

(2) Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State. It is not sufficient that compliance with the obligation is made more difficult or onerous, or that the acting State is assisted or directed in its conduct: such questions are covered by the preceding articles. Moreover, the coercing State must coerce the very act which is internationally wrongful. It is not enough that the consequences of the coerced act merely make it more difficult for the coerced State to comply with the obligation.

(3) Though coercion for the purpose of article 18 is narrowly defined, it is not limited to unlawful coercion.[319] As a practical matter, most cases of coercion meeting the requirements of the article will be unlawful, e.g., because they involve a threat or use of force contrary to the Charter of the United Nations, or because they involve intervention, i.e. coercive interference, in the affairs of another State. Such is also the case with countermeasures. They may have a coercive character, but as is made clear in article 49, their function is to induce a wrongdoing State to comply with obligations of cessation and reparation towards the State taking the countermeasures, not to coerce that State to violate obligations to third States.[320] However, coercion could possibly take other forms, e.g. serious economic pressure, provided that it is such as to deprive the coerced State of any possibility of conforming with the obligation breached.

(4) The equation of coercion with *force majeure* means that in most cases where article 18 is applicable, the responsibility of the coerced State will be precluded vis-à-vis the injured third State. This is reflected in the phrase "but for the coercion" in subparagraph (a) of article 18. Coercion amounting to *force majeure* may be the reason why the wrongfulness of an act is precluded vis-à-vis the coerced State. Therefore the act is not described as an internationally wrongful act in the opening clause of the article, as is done in articles 16 and 17, where no comparable circumstance would preclude the wrongfulness of the act of the assisted or controlled State. But there is no reason why the wrongfulness of that act should be precluded vis-à-vis the coercing State. On the contrary, if the coercing State cannot be held responsible for the act in question, the injured State may have no redress at all.

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[319] P. Reuter, *Introduction au droit des traités* (3rd edn.) (Paris, Presse Universitaire de France, 1995), pp. 159-161, paras. 271-274.

[320] See article 49 (2) and commentary.

(5) It is a further requirement for responsibility under article 18 that the coercing State must be aware of the circumstances which would, but for the coercion, have entailed the wrongfulness of the coerced State's conduct. The reference to "circumstances" in subparagraph (b) is understood as reference to the factual situation rather than to the coercing State's judgement of the legality of the act. This point is clarified by the phrase "circumstances of the act". Hence, while ignorance of the law is no excuse, ignorance of the facts is material in determining the responsibility of the coercing State.

(6) A State which sets out to procure by coercion a breach of another State's obligations to a third State will be held responsible to the third State for the consequences, regardless of whether the coercing State is also bound by the obligation in question. Otherwise, the injured State would potentially be deprived of any redress, because the acting State may be able to rely on *force majeure* as a circumstance precluding wrongfulness. Article 18 thus differs from articles 16 and 17 in that it does not allow for an exemption from responsibility for the act of the coerced State in circumstances where the coercing State is not itself bound by the obligation in question.

(7) State practice lends support to the principle that a State bears responsibility for the internationally wrongful conduct of another State which it coerces. In the *Romano-Americana* case, the claim of the United States Government in respect of the destruction of certain oil storage and other facilities owned by an American company on the orders of the Romanian Government during the First World War was originally addressed to the British Government. At the time the facilities were destroyed, Romania was at war with Germany, which was preparing to invade the country, and the United States claimed that the Romanian authorities had been "compelled" by Great Britain to take the measures in question. In support of its claim, the United States Government argued that the circumstances of the case revealed "a situation where a strong belligerent for a purpose primarily its own arising from its defensive requirements at sea, compelled a weaker Ally to acquiesce in an operation which it carried out in the territory of that Ally."[321] The British Government denied responsibility, asserting that its influence over the

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[321] Note from the United States Embassy in London, 16 February 1925, in Hackworth, *Digest*, vol. V, p. 702.

conduct of the Romanian authorities "did not in any way go beyond the limits of persuasion and good counsel as between governments associated in a common cause."[322] The point of disagreement between the governments of the United States and of Great Britain was not as to the responsibility of a State for the conduct of another State which it has coerced, but rather the existence of "compulsion" in the particular circumstances of the case.[323]

Article 19

Effect of this chapter

> This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

Commentary

(1) Article 19 serves three purposes. First, it preserves the responsibility of the State which has committed the internationally wrongful act, albeit with the aid or assistance, under the direction and control or subject to the coercion of another State. It recognizes that the attribution of international responsibility to an assisting, directing or coercing State does not preclude the responsibility of the assisted, directed or coerced State.

(2) Second, the article makes clear that the provisions of chapter IV are without prejudice to any other basis for establishing the responsibility of the assisting, directing or coercing State under any rule of international law defining particular conduct as wrongful. The phrase "under other provisions of these articles" is a reference, *inter alia*, to article 23 (*force majeure*), which might affect the question of responsibility. The phrase also draws attention to the fact that other provisions of the draft articles may be relevant to the State committing the act in question, and that chapter IV in no way precludes the issue of its responsibility in that regard.

(3) Third, article 19 preserves the responsibility "of any other State" to whom the internationally wrongful conduct might also be attributable under other provisions of the articles.

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[322] Note from the British Foreign Office dated 5 July 1928, ibid., p. 704.

[323] For a different example involving the coercion of a breach of contract in circumstances amounting to a denial of justice see C.L. Bouvé, "Russia's liability in tort for Persia's breach of contract", *A.J.I.L.*, vol. 6 (1912), p. 389.

(4) Thus article 19 is intended to avoid any contrary inference in respect of responsibility which may arise from primary rules, precluding certain forms of assistance or from acts otherwise attributable to any State under chapter II. The article covers both the implicated and the acting State. It makes it clear that chapter IV is concerned only with situations in which the act which lies at the origin of the wrong is an act committed by one State and not by the other. If both States commit the act, then that situation would fall within the realm of co-perpetrators, dealt with in chapter II.

Chapter V

Circumstances precluding wrongfulness

(1) Chapter V sets out six circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned. The existence in a given case of a circumstance precluding wrongfulness in accordance with this chapter provides a shield against an otherwise well-founded claim for the breach of an international obligation. The six circumstances are: consent (article 20), self-defence (article 21), countermeasures (article 22), *force majeure* (article 23), distress (article 24) and necessity (article 25). Article 26 makes it clear that none of these circumstances can be relied on if to do so would conflict with a peremptory norm of general international law. Article 27 deals with certain consequences of the invocation of one of these circumstances.

(2) Consistently with the approach of the present articles, the circumstances precluding wrongfulness set out in chapter V are of general application. Unless otherwise provided,[324] they apply to any internationally wrongful act whether it involves the breach by a State of an obligation arising under a rule of general international law, a treaty, a unilateral act or from any other source. They do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists. This was emphasized by the International Court in the *Gabčíkovo-Nagymaros Project* case. Hungary sought to argue that the wrongfulness of its conduct in discontinuing work on the Project in breach of its obligations under the 1977 Treaty was precluded by necessity. In dealing with the Hungarian plea, the Court said:

> "The state of necessity claimed by Hungary - supposing it to have been established - thus could not permit of the conclusion that ... it had acted in accordance with its obligations

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[324] E.g., by a treaty to the contrary, which would constitute a *lex specialis* under article 55.

> under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did."[325]

Thus a distinction must be drawn between the effect of circumstances precluding wrongfulness and the termination of the obligation itself. The circumstances in chapter V operate as a shield rather than a sword. As Fitzmaurice noted, where one of the circumstances precluding wrongfulness applies, "the non-performance is not only justified, but 'looks towards' a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present ..."[326]

(3) This distinction emerges clearly from the decisions of international tribunals. In the *Rainbow Warrior* arbitration, the Tribunal held that both the law of treaties and the law of State responsibility had to be applied, the former to determine whether the treaty was still in force, the latter to determine what the consequences were of any breach of the treaty while it was in force, including the question whether the wrongfulness of the conduct in question was precluded.[327] In the *Gabčíkovo-Nagymaros Project* case, the Court noted that:

> "Even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but - unless the parties by mutual agreement terminate the treaty - it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives."[328]

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[325] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports 1997*, p. 7, at p. 39, para. 48.

[326] Fitzmaurice, "Fourth Report on the Law of Treaties", *Yearbook ...1959*, vol. II, p. 41.

[327] *Rainbow Warrior (New Zealand/France)*, *UNRIAA*, vol. XX, p. 217 (1990), at pp. 251-252, para. 75.

[328] *I.C.J. Reports 1997*, p. 7, at p. 63, para. 101; see also p. 38, para. 47.

(4) While the same facts may amount, for example, to *force majeure* under article 23 and to a supervening impossibility of performance under article 61 of the Vienna Convention on the Law of Treaties,[329] the two are distinct. *Force majeure* justifies non-performance of the obligation for so long as the circumstance exists; supervening impossibility justifies the termination of the treaty or its suspension in accordance with the conditions laid down in article 61. The former operates in respect of the particular obligation, the latter with respect to the treaty which is the source of that obligation. Just as the scope of application of the two doctrines is different, so is their mode of application. *Force majeure* excuses non-performance for the time being, but a treaty is not automatically terminated by supervening impossibility: at least one of the parties must decide to terminate it.

(5) The concept of circumstances precluding wrongfulness may be traced to the work of the Preparatory Committee of the 1930 Hague Conference. Among its Bases of Discussion,[330] it listed two "Circumstances under which States can decline their responsibility", self-defence and reprisals.[331] It considered that the extent of a State's responsibility in the context of diplomatic protection could also be affected by the "provocative attitude" adopted by the injured person (Basis of Discussion No. 19) and that a State could not be held responsible for damage caused by its armed forces "in the suppression of an insurrection, riot or other disturbance" (Basis of Discussion No. 21). However, these issues were not taken to any conclusion.

(6) The category of circumstances precluding wrongfulness was developed by the International Law Commission in its work on international responsibility for injuries to aliens[332]

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[329] Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

[330] *Yearbook ... 1956*, vol. II, pp. 223-225.

[331] Ibid., pp. 224-225. Issues raised by the Calvo clause and the exhaustion of local remedies were dealt with under the same heading.

[332] *Yearbook ... 1958*, vol. II, p. 72. For the discussion of the circumstances by García Amador, see his "First Report on State responsibility", *Yearbook ... 1956*, vol. II, pp. 203-209 and his "Third Report on State responsibility", *Yearbook ... 1958*, vol. II, pp. 50-55.

and the performance of treaties.[333] In the event the subject of excuses for the non-performance of treaties was not included within the scope of the Vienna Convention on the Law of Treaties.[334] It is a matter for the law on State responsibility.

(7) Circumstances precluding wrongfulness are to be distinguished from other arguments which may have the effect of allowing a State to avoid responsibility. They have nothing to do with questions of the jurisdiction of a court or tribunal over a dispute or the admissibility of a claim. They are to be distinguished from the constituent requirements of the obligation, i.e., those elements which have to exist for the issue of wrongfulness to arise in the first place and which are in principle specified by the obligation itself. In this sense the circumstances precluding wrongfulness operate like defences or excuses in internal legal systems, and the circumstances identified in chapter V are recognized by many legal systems, often under the same designation.[335] On the other hand, there is no common approach to these circumstances in internal law, and the conditions and limitations in chapter V have been developed independently.

(8) Just as the Articles do not deal with questions of the jurisdiction of courts or tribunals, so they do not deal with issues of evidence or the burden of proof. In a bilateral dispute over State responsibility, the onus of establishing responsibility lies in principle on the claimant State. Where conduct in conflict with an international obligation is attributable to a State and that State seeks to avoid its responsibility by relying on a circumstance under chapter V, however, the position changes and the onus lies on that State to justify or excuse its conduct. Indeed, it is often the case that only that State is fully aware of the facts which might excuse its non-performance.

(9) Chapter V sets out the circumstances precluding wrongfulness presently recognized under general international law.[336] Certain other candidates have been excluded. For example,

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[333] Fitzmaurice, "Fourth Report on the Law of Treaties", *Yearbook ... 1959*, vol. II, pp. 44-47, and for his commentary, ibid., pp. 63-74.

[334] See article 73 of the Vienna Convention on the Law of Treaties.

[335] See the comparative review by C. von Bar, *The Common European Law of Torts*, vol. 2 (Munich, Beck, 2000), pp. 499-592.

[336] For the effect of contribution to the injury by the injured State or other person or entity see article 39 and commentary. This does not preclude wrongfulness but is relevant in determining the extent and form of reparation.

the exception of non-performance (*exceptio inadimpleti contractus*) is best seen as a specific feature of certain mutual or synallagmatic obligations and not a circumstance precluding wrongfulness.[337] The principle that a State may not benefit from its own wrongful act is capable of generating consequences in the field of State responsibility but it is rather a general principle than a specific circumstance precluding wrongfulness.[338] The so-called "clean hands" doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied. It also does not need to be included here.[339]

Article 20

Consent

> Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Commentary

(1) Article 20 reflects the basic international law principle of consent in the particular context of Part I. In accordance with this principle, consent by a State to particular conduct by another State precludes the wrongfulness of that act in relation to the consenting State, provided the consent is valid and to the extent that the conduct remains within the limits of the consent given.

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[337] Compare *Diversion of Water from the Meuse (Netherlands v. Belgium), 1937, P.C.I.J., Series A/B, No. 70,* p. 4, esp. at pp. 50, 77. See further Fitzmaurice, "Fourth Report on the Law of Treaties", *Yearbook... 1959*, vol. II, pp. 43-47; D.W. Greig, "Reciprocity, Proportionality and the Law of Treaties", *Virginia Journal of International Law,* vol. 34 (1994), p. 295; and for a comparative review, G.H. Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford, Clarendon Press, 1987), pp. 245-317. For the relationship between the exception of non-performance and countermeasures see below, commentary to Part Three, chapter II, para. (5).

[338] See e.g. *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, p. 31; cf. *Gabčíkovo-Nagymaros Project, I.C.J. Reports 1997,* p. 7, at p. 67, para. 110.

[339] See J.J.A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *A.F.D.I.*, vol. 10 (1964), p. 225; A. Miaja de la Muela, "Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux", in *Mélanges offerts à Juraj Andrassy* (The Hague, Martinus Nijhoff, 1968), p. 189, and the dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986,* p. 14, at pp. 392-394.

(2) It is a daily occurrence that States consent to conduct of other States which, without such consent, would constitute a breach of an international obligation. Simple examples include transit through the airspace or internal waters of a State, the location of facilities on its territory or the conduct of official investigations or inquiries there. But a distinction must be drawn between consent in relation to a particular situation or a particular course of conduct, and consent in relation to the underlying obligation itself. In the case of a bilateral treaty the States parties can at any time agree to terminate or suspend the treaty, in which case obligations arising from the treaty will be terminated or suspended accordingly.[340] But quite apart from that possibility, States have the right to dispense with the performance of an obligation owed to them individually, or generally to permit conduct to occur which (absent such permission) would be unlawful so far as they are concerned. In such cases, the primary obligation continues to govern the relations between the two States, but it is displaced on the particular occasion or for the purposes of the particular conduct by reason of the consent given.

(3) Consent to the commission of otherwise wrongful conduct may be given by a State in advance or even at the time it is occurring. By contrast cases of consent given after the conduct has occurred are a form of waiver or acquiescence, leading to loss of the right to invoke responsibility. This is dealt with in article 45.

(4) In order to preclude wrongfulness, consent dispensing with the performance of an obligation in a particular case must be "valid". Whether consent has been validly given is a matter addressed by international law rules outside the framework of State responsibility. Issues include whether the agent or person who gave the consent was authorized to do so on behalf of the State (and if not, whether the lack of that authority was known or ought to have been known to the acting State), or whether the consent was vitiated by coercion or some other factor.[341] Indeed there may be a question whether the State could validly consent at all. The reference to a "valid consent" in article 20 highlights the need to consider these issues in certain cases.

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[340] Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 54 (b).

[341] See, e.g., the issue of Austrian consent to the *Anschluss* of 1938, dealt with by the Nürnberg Tribunal. The Tribunal denied that Austrian consent had been given; even if it had, it would have been coerced and did not excuse the annexation. See International Military Tribunal for the Trial of German Major War Criminals, judgment of 1 October 1946, reprinted in *A.J.I.L.*, vol. 41 (1947) p. 172, at pp. 192-194.

(5) Whether a particular person or entity had the authority to grant consent in a given case is a separate question from whether the conduct of that person or entity was attributable to the State for the purposes of chapter II. For example, the issue has arisen whether consent expressed by a regional authority could legitimize the sending of foreign troops into the territory of a State, or whether such consent could only be given by the central government, and such questions are not resolved by saying that the acts of the regional authority are attributable to the State under article 4.[342] In other cases, the "legitimacy" of the government which has given the consent has been questioned. Sometimes the validity of consent has been questioned because the consent was expressed in violation of relevant provisions of the State's internal law. These questions depend on the rules of international law relating to the expression of the will of the State, as well as rules of internal law to which, in certain cases, international law refers.

(6) Who has authority to consent to a departure from a particular rule may depend on the rule. It is one thing to consent to a search of embassy premises, another to the establishment of a military base on the territory of a State. Different officials or agencies may have authority in different contexts, in accordance with the arrangements made by each State and general principles of actual and ostensible authority. But in any case, certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked. Consent may be vitiated by error, fraud, corruption or coercion. In this respect, the principles concerning the validity of consent to treaties provide relevant guidance.

(7) Apart from drawing attention to prerequisites to a valid consent, including issues of the authority to consent, the requirement for consent to be valid serves a further function. It points to the existence of cases in which consent may not be validly given at all. This question is discussed in relation to article 26 (compliance with peremptory norms), which applies to Part V as a whole.[343]

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[342] This issue arose with respect to the dispatch of Belgian troops to the Republic of Congo in 1960. See *S.C.O.R., Fifteenth Year*, 873rd meeting, 13-14 July 1960, particularly the statement of the representative of Belgium, paras. 186-188, 209.

[343] See commentary to article 26, para. (6).

(8) Examples of consent given by a State which has the effect of rendering certain conduct lawful include commissions of inquiry sitting on the territory of another State, the exercise of jurisdiction over visiting forces, humanitarian relief and rescue operations and the arrest or detention of persons on foreign territory. In the *Savarkar* case, the arbitral tribunal considered that the arrest of Savarkar was not a violation of French sovereignty as France had implicitly consented to the arrest through the conduct of its gendarme, who aided the British authorities in the arrest.[344] In considering the application of article 20 to such cases it may be necessary to have regard to the relevant primary rule. For example, only the head of a diplomatic mission can consent to the receiving State's entering the premises of the mission.[345]

(9) Article 20 is concerned with the relations between the two States in question. In circumstances where the consent of a number of States is required, the consent of one State will not preclude wrongfulness in relation to another.[346] Furthermore, where consent is relied on to preclude wrongfulness, it will be necessary to show that the conduct fell within the limits of the consent. Consents to overflight by commercial aircraft of another State would not preclude the wrongfulness of overflight by aircraft transporting troops and military equipment. Consent to the stationing of foreign troops for a specific period would not preclude the wrongfulness of the stationing of such troops beyond that period.[347] These limitations are indicated by the words "given act" in article 20 as well as by the phrase "within the limits of that consent".

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[344] *UNRIAA*., vol. XI, p. 243 (1911), at pp. 252-255.

[345] Vienna Convention on Diplomatic Relations, United Nations, *Treaty Series*, vol. 500, p. 95, art. 22 (1).

[346] Austrian consent to the proposed customs union of 1931 would not have precluded its wrongfulness in regard of the obligation to respect Austrian independence owed by Germany to all the Parties to the Treaty of Versailles. Likewise, Germany's consent would not have precluded the wrongfulness of the customs union in respect of the obligation of the maintenance of its complete independence imposed on Austria by the Treaty of St. Germain. See *Customs Regime between Germany and Austria, 1931, P.C.I.J., Series A/B, No. 41*, p. 37, at pp. 46, 49.

[347] The non-observance of a condition placed on the consent will not necessarily take conduct outside of the limits of the consent. For example, consent to a visiting force on the territory of a State may be subject to a requirement to pay rent for the use of facilities. While the non-payment of the rent would no doubt be a wrongful act, it would not transform the visiting force into an army of occupation.

(10) Article 20 envisages only the consent of States to conduct otherwise in breach of an international obligation. International law may also take into account the consent of non-State entities such as corporations or private persons. The extent to which investors can waive the rules of diplomatic protection by agreement in advance has long been controversial, but under the Washington Convention of 1965, consent by an investor to arbitration under the Convention has the effect of suspending the right of diplomatic protection by the investor's national State.[348] The rights conferred by international human rights treaties cannot be waived by their beneficiaries, but the individual's free consent may be relevant to their application.[349] In these cases the particular rule of international law itself allows for the consent in question and deals with its effect. By contrast article 20 states a general principle so far as enjoyment of the rights and performance of the obligations of States are concerned.

Article 21

Self-defence

> The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Commentary

(1) The existence of a general principle admitting self-defence as an exception to the prohibition against the use of force in international relations is undisputed. Article 51 of the Charter of the United Nations preserves a State's "inherent right" of self-defence in the face of an armed attack and forms part of the definition of the obligation to refrain from the threat or use of force laid down in Article 2, paragraph (4). Thus a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph (4).[350]

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[348] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, United Nations, *Treaty Series*, vol. 575, p. 159, art. 27 (1).

[349] See, e.g., International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, p. 171, arts. 7; 8 (3); 14 (1) (g); 23 (3).

[350] Cf. *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996*, p. 226, at p. 244, para. 38; p. 263, para. 96, emphasizing the lawfulness of the use of force in self-defence.

(2) Self-defence may justify non-performance of certain obligations other than that under Article 2, paragraph (4), of the Charter, provided that such non-performance is related to the breach of that provision. Traditional international law dealt with these problems by instituting a separate legal regime of war, defining the scope of belligerent rights and suspending most treaties in force between the belligerents on the outbreak of war.[351] In the Charter period, declarations of war are exceptional and military actions proclaimed as self-defence by one or both parties occur between States formally at "peace" with each other.[352] The Vienna Convention on the Law of Treaties leaves such issues to one side by providing in article 73 that the Convention does not prejudice "any question that may arise in regard to a treaty ... from the outbreak of hostilities between States".

(3) This is not to say that self-defence precludes the wrongfulness of conduct in all cases or with respect to all obligations. Examples relate to international humanitarian law and human rights obligations. The Geneva Conventions of 1949 and Protocol I of 1977 apply equally to all the parties in an international armed conflict, and the same is true of customary international humanitarian law.[353] Human rights treaties contain derogation provisions for times of public emergency, including actions taken in self-defence. As to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.

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[351] See further A. McNair & A. D. Watts, *Legal Effects of War* (4th edn.) (Cambridge, Cambridge University Press, 1966), p. 579.

[352] In *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, I.C.J. Reports 1996*, p. 803, it was not denied that the Treaty of Amity of 1955 remained in force, despite many actions by United States naval forces against Iran. In that case both parties agreed that to the extent that any such actions were justified by self-defence they would be lawful.

[353] As the Court said of the rules of international humanitarian law in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996*, p. 226, at p. 257, para. 79, they constitute "intransgressible principles of international customary law". On the relationship between human rights and humanitarian law in time of armed conflict, see ibid., p. 240, para. 25.

(4) The International Court in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* provided some guidance on this question. One issue before the Court was whether a use of nuclear weapons would necessarily be a breach of environmental obligations because of the massive and long-term damage such weapons can cause. The Court said:

> "[T]he issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict. The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality."[354]

A State acting in self-defence is "totally restrained" by an international obligation if that obligation is expressed or intended to apply as a definitive constraint even to States in armed conflict.[355]

(5) The essential effect of article 21 is to preclude the wrongfulness of conduct of a State acting in self-defence vis-à-vis an attacking State. But there may be effects vis-à-vis third States in certain circumstances. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court observed that:

> "[A]s in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons may be used."[356]

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[354] *I.C.J. Reports 1996*, p. 226, at p. 242, para. 30.

[355] See, e.g., Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, United Nations, *Treaty Series*, vol. 1108, p. 151.

[356] *I.C.J. Reports 1996*, p. 226, at p. 261, para. 89.

The law of neutrality distinguishes between conduct as against a belligerent and conduct as against a neutral. But neutral States are not unaffected by the existence of a state of war. Article 21 leaves open all issues of the effect of action in self-defence vis-à-vis third States.

(6) Thus article 21 reflects the generally accepted position that self-defence precludes the wrongfulness of the conduct taken within the limits laid down by international law. The reference is to action "taken in conformity with the Charter of the United Nations". In addition, the term "lawful" implies that the action taken respects those obligations of total restraint applicable in international armed conflict, as well as compliance with the requirements of proportionality and of necessity inherent in the notion of self-defence. Article 21 simply reflects the basic principle for the purposes of chapter V, leaving questions of the extent and application of self-defence to the applicable primary rules referred to in the Charter.

Article 22

Countermeasures in respect of an internationally wrongful act

> The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three.

Commentary

(1) In certain circumstances, the commission by one State of an internationally wrongful act may justify another State injured by that act in taking non-forcible countermeasures in order to procure its cessation and to achieve reparation for the injury. Article 22 deals with this situation from the perspective of circumstances precluding wrongfulness. Chapter II of Part Three regulates countermeasures in further detail.

(2) Judicial decisions, State practice and doctrine confirm the proposition that countermeasures meeting certain substantive and procedural conditions may be legitimate. In the *Gabčíkovo-Nagymaros Project* case, the International Court clearly accepted that countermeasures might justify otherwise unlawful conduct "taken in response to a previous international wrongful act of another State and … directed against that State",[357] provided certain

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[357] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997*, p. 7, at p. 55, para. 83.

conditions are met. Similar recognition of the legitimacy of measures of this kind in certain cases can be found in arbitral decisions, in particular the *Naulilaa*,[358] *Cysne*,[359] and *Air Services*[360] awards.

(3) In the literature concerning countermeasures, reference is sometimes made to the application of a "sanction", or to a "reaction" to a prior internationally wrongful act; historically the more usual terminology was that of "legitimate reprisals" or, more generally, measures of "self-protection" or "self-help". The term "sanctions" has been used for measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the United Nations Charter - despite the fact that the Charter uses the term "measures", not "sanctions". The term "reprisals" is now no longer widely used in the present context, because of its association with the law of belligerent reprisals involving the use of force. At least since the *Air Services* arbitration,[361] the term "countermeasures" has been preferred, and it has been adopted for the purposes of the present Articles.

(4) Where countermeasures are taken in accordance with article 22, the underlying obligation is not suspended, still less terminated; the wrongfulness of the conduct in question is precluded for the time being by reason of its character as a countermeasure, but only provided that and for so long as the necessary conditions for taking countermeasures are satisfied. These conditions are set out in Part Three, chapter II, to which article 22 refers. As a response to internationally wrongful conduct of another State countermeasures may be justified only in relation to that State. This is emphasized by the phrases "if and to the extent" and "countermeasures taken against" the responsible State. An act directed against a third State would not fit this definition and could not be justified as a countermeasure. On the other hand, indirect or consequential effects of countermeasures on third parties, which do not involve an independent breach of any obligation to those third parties, will not take a countermeasure outside the scope of article 22.

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[358] *"Naulilaa" (Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa)*, *UNRIAA*, vol. II, p. 1011 (1928), at pp. 1025-1026.

[359] *"Cysne" (Responsibility of Germany for acts committed subsequent to 31 July 1914 and before Portugal entered into the war)*, *UNRIAA*, vol. II, p. 1035 (1930), at p. 1052.

[360] *Air Services Agreement of 27 March 1946 (United States v. France)*, *UNRIAA*, vol. XVIII, p. 416 (1979).

[361] Ibid., vol. XVIII, p. 416 (1979), especially at pp. 443-446, paras. 80-98.

(5) Countermeasures may only preclude wrongfulness in the relations between an injured State and the State which has committed the internationally wrongful act. The principle is clearly expressed in the *Cysne* case, where the Tribunal stressed that …

> "reprisals, which constitute an act in principle contrary to the law of nations, are defensible only in so far as they were *provoked* by some other act likewise contrary to that law. *Only reprisals taken against the provoking State are permissible.* Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavour to avoid or to limit as far as possible."[362]

Accordingly the wrongfulness of Germany's conduct vis-à-vis Portugal was not precluded. Since it involved the use of armed force, this decision concerned belligerent reprisals rather than countermeasures in the sense of article 22. But the same principle applies to countermeasures, as the Court confirmed in the *Gabčíkovo-Nagymaros Project* case when it stressed that the measure in question must be "directed against" the responsible State.[363]

(6) If article 22 had stood alone, it would have been necessary to spell out other conditions for the legitimacy of countermeasures, including in particular the requirement of proportionality, the temporary or reversible character of countermeasures and the status of certain fundamental obligations which may not be subject to countermeasures. Since these conditions are dealt with in Part Three, chapter II, it is sufficient to make a cross-reference to them here. Article 22 covers any action which qualifies as a countermeasure in accordance with those conditions. One issue is whether countermeasures may be taken by third States which are not themselves individually injured by the internationally wrongful act in question, although they are owed the obligation which has been breached.[364] For example, in the case of an obligation owed to the international community as a whole the International Court has affirmed that all States have a legal interest in

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[362] Ibid., vol. II, p. 1035 (1930), at pp. 1056-1057 (emphasis in original).

[363] *I.C.J. Reports 1997*, p. 7, at p. 55, para. 83.

[364] For the distinction between injured States and other States entitled to invoke State responsibility see articles 42 and 48 and commentaries.

compliance.[365] Article 54 leaves open the question whether any State may take measures to ensure compliance with certain international obligations in the general interest as distinct from its own individual interest as an injured State. While article 22 does not cover measures taken in such a case to the extent that these do not qualify as countermeasures, neither does it exclude that possibility.

Article 23

Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(*a*) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) The State has assumed the risk of that situation occurring.

Commentary

(1) *Force majeure* is quite often invoked as a ground for precluding the wrongfulness of an act of a State.[366] It involves a situation where the State in question is in effect compelled to act in a manner not in conformity with the requirements of an international obligation incumbent upon it. *Force majeure* differs from a situation of distress (article 24) or necessity (article 25) because the conduct of the State which would otherwise be internationally wrongful is involuntary or at least involves no element of free choice.

(2) A situation of *force majeure* precluding wrongfulness only arises where three elements are met: (a) the act in question must be brought about by an irresistible force or an unforeseen event, (b) which is beyond the control of the State concerned, and (c) which makes it materially impossible in the circumstances to perform the obligation. The adjective "irresistible" qualifying

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[365] *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33.

[366] See *Secretariat Survey*, "'Force majeure' and 'fortuitous event' as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine", *Yearbook ... 1978*, vol. II, Part One, p. 61.

the word "force" emphasizes that there must be a constraint which the State was unable to avoid or oppose by its own means. To have been "unforeseen" the event must have been neither foreseen nor of an easily foreseeable kind. Further the "irresistible force" or "unforeseen event" must be causally linked to the situation of material impossibility, as indicated by the words "due to *force majeure* … making it materially impossible". Subject to paragraph 2, where these elements are met the wrongfulness of the State's conduct is precluded for so long as the situation of *force majeure* subsists.

(3) Material impossibility of performance giving rise to *force majeure* may be due to a natural or physical event (e.g., stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought) or to human intervention (e.g., loss of control over a portion of the State's territory as a result of an insurrection or devastation of an area by military operations carried out by a third State), or some combination of the two. Certain situations of duress or coercion involving force imposed on the State may also amount to *force majeure* if they meet the various requirements of article 23. In particular the situation must be irresistible, so that the State concerned has no real possibility of escaping its effects. *Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis. Nor does it cover situations brought about by the neglect or default of the State concerned,[367] even if the resulting injury itself was accidental and unintended.[368]

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[367] E.g., in relation to occurrences such as the bombing of La-Chaux-de-Fonds by German airmen on 17 October 1915, and of Porrentruy by a French airman on 26 April 1917, ascribed to negligence on the part of the airmen, the belligerent undertook to punish the offenders and make reparation for the damage suffered: *Secretariat Survey*, paras. 255-256.

[368] E.g., in 1906 an American officer on the U.S.S. *Chattanooga* was mortally wounded by a bullet from a French warship as his ship entered the Chinese harbour of Chefoo. The United States Government obtained reparation, having maintained that:

> "While the killing of Lieutenant England can only be viewed as an accident, it cannot be regarded as belonging to the unavoidable class whereby no responsibility is entailed. Indeed, it is not conceivable how it could have occurred without the contributory element of lack of proper precaution on the part of those officers of the *Dupetit Thouars* who were in responsible charge of the rifle firing practice and who failed to stop firing when the *Chattanooga*, in the course of her regular passage through the public channel, came into the line of fire."

Whiteman, *Damages*, vol. I, p. 221. See also *Secretariat Survey*, para. 130.

(4) In drafting what became article 61 of the Vienna Convention on the Law of Treaties, the International Law Commission took the view that *force majeure* was a circumstance precluding wrongfulness in relation to treaty performance, just as supervening impossibility of performance was a ground for termination of a treaty.[369] The same view was taken at the Vienna Conference.[370] But in the interests of the stability of treaties, the Conference insisted on a narrow formulation of article 61 so far as treaty termination is concerned. The degree of difficulty associated with *force majeure* as a circumstance precluding wrongfulness, though considerable, is less than is required by article 61 for termination of a treaty on grounds of supervening impossibility, as the International Court pointed out in the *Gabčíkovo-Nagymaros Project* case:

> "Article 61, paragraph 1, requires the 'permanent disappearance or destruction of an object indispensable for the execution' of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties... Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept."[371]

(5) In practice, many of the cases where "impossibility" has been relied upon have not involved actual impossibility as distinct from increased difficulty of performance and the plea of *force majeure* has accordingly failed. But cases of material impossibility have occurred,

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[369] *Yearbook ... 1966*, vol. II, p. 255.

[370] See, e.g., the proposal of the Mexican representative, *Official Records of the United Nations Conference on the Law of Treaties Documents of the Conference*, pp. 182-189, A/CONF.39/14, para. 531 (a).

[371] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997*, p. 7, at p. 63, para. 102.

e.g. where a State aircraft is forced, due to damage or loss of control of the aircraft due to weather, into the airspace of another State without the latter's authorization. In such cases the principle that wrongfulness is precluded has been accepted.[372]

(6) Apart from aerial incidents, the principle in article 23 is also recognized in relation to ships in innocent passage by article 14 (3) of the 1958 Convention on the Territorial Sea and the Contiguous Zone[373] (article 18 (2) of the 1982 United Nations Convention on the Law of the Sea[374]), as well as in article 7 (1) of the Convention on Transit Trade of Land-locked States of 8 July 1965.[375] In these provisions, *force majeure* is incorporated as a constituent element of the relevant primary rule; nonetheless its acceptance in these cases helps to confirm the existence of a general principle of international law to similar effect.

(7) The principle has also been accepted by international tribunals. Mixed claims commissions have frequently cited the unforeseeability of attacks by rebels in denying the responsibility of the territorial State for resulting damage suffered by foreigners.[376] In the *Lighthouses* arbitration, a lighthouse owned by a French company had been requisitioned by the

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[372] See, e.g., the cases of accidental intrusion into airspace attributable to weather, and the cases of accidental bombing of neutral territory attributable to navigational errors during the First World War discussed in the *Secretariat Survey*, paras. 250-256. See also the exchanges of correspondence between the States concerned in the incidents involving United States military aircraft entering the airspace of Yugoslavia in 1946: United States of America, *Department of State Bulletin,* vol. XV, No. 376 (15 September 1946), p. 502, reproduced in *Secretariat Survey*, para. 144, and the incident provoking the application to the International Court in 1954: *I.C.J. Pleadings, Treatment in Hungary of Aircraft and Crew of the United States of America*, p. 14 (note to the Hungarian Government of 17 March 1953). It is not always clear whether these cases are based on distress or *force majeure*.

[373] United Nations, *Treaty Series*, vol. 516, p. 205.

[374] United Nations, *Treaty Series*, vol. 1833, p. 397.

[375] United Nations, *Treaty Series*, vol. 597, p. 42.

[376] See, e.g., the decision of the American-British Claims Commission in the *Saint Albans Raid* case (1873), Moore, *International Arbitrations*, vol. IV, p. 4042; *Secretariat Survey*, para. 339; the decisions of the United States/Venezuelan Claims Commission in the *Wipperman* case, Moore, *International Arbitrations,* vol. III, p. 3039; *Secretariat Survey*, paras. 349-350; *De Brissot and others* cases, Moore, *International Arbitrations,* vol III, p. 2967; *Secretariat Survey*, para. 352; and the decision of the British Mexican Claims Commission in the *Gill* case: *UNRIAA*, vol. V, p. 157 (1931); *Secretariat Survey*, para. 463.

Greek Government in 1915 and was subsequently destroyed by enemy action. The arbitral tribunal denied the French claim for restoration of the lighthouse on grounds of *force majeure*.[377] In the *Russian Indemnity* case, the principle was accepted but the plea of *force majeure* failed because the payment of the debt was not materially impossible.[378] *Force majeure* was acknowledged as a general principle of law (though again the plea was rejected on the facts of the case) by the Permanent Court of International Justice in the *Serbian Loans* and *Brazilian Loans* cases.[379] More recently, in the *Rainbow Warrior* arbitration, France relied on *force majeure* as a circumstance precluding the wrongfulness of its conduct in removing the officers from Hao and not returning them following medical treatment. The Tribunal dealt with the point briefly:

> "New Zealand is right in asserting that the excuse of *force majeure* is not of relevance in this case because the test of its applicability is of absolute and material impossibility, and because a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*."[380]

(8) In addition to its application in inter-State cases as a matter of public international law, *force majeure* has substantial currency in the field of international commercial arbitration, and may qualify as a general principle of law.[381]

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[377] *Ottoman Empire Lighthouses Concession, UNRIAA*, vol. XII, p. 155 (1956), at pp. 219-220.

[378] Ibid., vol. XI, p. 421 (1912), at p. 443.

[379] *Serbian Loans, 1929, P.C.I.J., Series A, No. 20, at pp. 33-40; Brazilian Loans, 1929, P.C.I.J., Series A, No. 21*, at p. 120.

[380] *Rainbow Warrior (New Zealand/France), UNRIAA*, vol. XX, p. 217 (1990), at p. 253.

[381] On *force majeure* in the case law of the Iran-United States Claims Tribunal, see G.H. Aldrich, The *Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), pp. 306-320. *Force majeure* has also been recognized as a general principle of law by the European Court of Justice: see, e.g., Case 145/85, *Denkavit Belgie NV v. Belgium*, [1987] E.C.R. 565; Case 101/84, *Commission v. Italy*, [1985] E.C.R. 2629. See also art. 79 of the UNCITRAL Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, *U.N.T.S.*, vol. 1489, p. 58; P. Schlechtriem & G. Thomas, C*ommentary on the United Nations Convention on the International Sale of Goods* (2nd edn.) (Oxford, Clarendon Press, 1998), pp. 600-626; and art. 7.1.7 of the UNIDROIT Principles of International Commercial Contracts, in UNIDROIT, *Principles of International Commercial Contracts* (Rome, 1994), pp. 169-171.

(9) A State may not invoke *force majeure* if it has caused or induced the situation in question. In *Libyan Arab Foreign Investment Company v. Republic of Burundi,*[382] the Arbitral Tribunal rejected a plea of *force majeure* because "the alleged impossibility [was] not the result of an irresistible force or an unforeseen external event beyond the control of Burundi. In fact, the impossibility is the result of a unilateral decision of that State ..."[383] Under the equivalent ground for termination of a treaty in article 61 of the Vienna Convention on the Law of Treaties, material impossibility cannot be invoked "if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty". By analogy with this provision, subparagraph (2) (a) excludes the plea in circumstances where *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it. For subparagraph 2 (a) to apply it is not enough that the State invoking *force majeure* has contributed to the situation of material impossibility; the situation of *force majeure* must be "due" to the conduct of the State invoking it. This allows for *force majeure* to be invoked in situations in which a State may have unwittingly contributed to the occurrence of material impossibility by something which, in hindsight, might have been done differently but which was done in good faith and did not itself make the event any less unforeseen. Subparagraph 2 (a) requires that the State's role in the occurrence of *force majeure* must be substantial.

(10) Subaragraph 2 (b) deals with situations in which the State has already accepted the risk of the occurrence of *force majeure*, whether it has done so in terms of the obligation itself or by its conduct or by virtue of some unilateral act. This reflects the principle that *force majeure* should not excuse performance if the State has undertaken to prevent the particular situation arising or has otherwise assumed that risk.[384] Once a State accepts the responsibility for a particular risk it cannot then claim *force majeure* to avoid responsibility. But the assumption of risk must be unequivocal and directed towards those to whom the obligation is owed.

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[382] *I.L.R.*, vol. 96 (1994), p. 279.

[383] Ibid. at p. 318, para. 55.

[384] As the *Secretariat Survey*, para. 31 points out, States may renounce the right to rely on *force majeure* by agreement. The most common way of doing so would be by an agreement or obligation assuming in advance the risk of the particular *force majeure* event.

Article 24

Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(*a*) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) The act in question is likely to create a comparable or greater peril.

Commentary

(1) Article 24 deals with the specific case where an individual whose acts are attributable to the State is in a situation of peril, either personally or in relation to persons under his or her care. The article precludes the wrongfulness of conduct adopted by the State agent in circumstances where the agent had no other reasonable way of saving life. Unlike situations of *force majeure* dealt with in article 23, a person acting under distress is not acting involuntarily, even though the choice is effectively nullified by the situation of peril.[385] Nor is it a case of choosing between compliance with international law and other legitimate interests of the State, such as characterize situations of necessity under article 25. The interest concerned is the immediate one of saving people's lives, irrespective of their nationality.

(2) In practice, cases of distress have mostly involved aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure.[386] An example is the entry of United States military aircraft into Yugoslavia's airspace in 1946. On two occasions, United States military aircraft entered Yugoslav airspace without authorization and were attacked by Yugoslav air defences. The United States Government protested the Yugoslav

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[385] For this reason, writers who have considered this situation have often defined it as one of "relative impossibility" of complying with the international obligation. See, e.g., O.J. Lissitzyn, "The Treatment of Aerial Intruders in Recent Practice and International Law", *A.J.I.L.*, vol. 47 (1953), p. 588.

[386] See *Secretariat Survey*, "'Force majeure' and 'fortuitous event' as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine", *Yearbook ... 1978*, vol. II, Part One, p. 61, paras. 141-142, 252.

action on the basis that the aircraft had entered Yugoslav airspace solely in order to escape extreme danger. The Yugoslav Government responded by denouncing the systematic violation of its airspace, which it claimed could only be intentional in view of its frequency. A later note from the Yugoslav Chargé d'Affaires informed the American Department of State that Marshal Tito had forbidden any firing on aircraft which flew over Yugoslav territory without authorization, presuming that, for its part, the United States Government "would undertake the steps necessary to prevent these flights, except in the case of emergency or bad weather, for which arrangements could be made by agreement between American and Yugoslav authorities".[387] The reply of the American Acting Secretary of State reiterated the assertion that no American planes had flown over Yugoslavia intentionally without prior authorization from Yugoslav authorities "unless forced to do so in an emergency". However, the Acting Secretary of State added:

> "I presume that the Government of Yugoslavia recognizes that in case a plane and its occupants are jeopardized, the aircraft may change its course so as to seek safety even though such action may result in flying over Yugoslav territory without prior clearance."[388]

(3) Claims of distress have also been made in cases of violation of maritime boundaries. For example, in December 1975, after British naval vessels entered Icelandic territorial waters, the United Kingdom Government claimed that the vessels in question had done so in search of "shelter from severe weather, as they have the right to do under customary international law".[389] Iceland maintained that British vessels were in its waters for the sole purpose of provoking an incident, but did not contest the point that if the British vessels had been in a situation of distress, they could enter Icelandic territorial waters.

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[387] United States, *Department of State Bulletin*, vol. XV (15 September 1946), p. 502, reproduced in *Secretariat Survey*, para. 144.

[388] *Secretariat Survey*, para. 145. The same argument is found in the Memorial of 2 December 1958 submitted by the United States Government to the International Court of Justice in relation to another aerial incident: see *I.C.J. Pleadings*, *Aerial Incident of 27 July 1955*, pp. 358-359.

[389] *S.C.O.R.*, *Thirtieth Year*, 1866th meeting., 16 December 1975; *Secretariat Survey*, para. 136.

(4) Although historically practice has focused on cases involving ships and aircraft, article 24 is not limited to such cases.[390] The *Rainbow Warrior* arbitration involved a plea of distress as a circumstance precluding wrongfulness outside the context of ships or aircraft. France sought to justify its conduct in removing the two officers from the island of Hao on the ground of "circumstances of distress in a case of extreme urgency involving elementary humanitarian considerations affecting the acting organs of the State".[391] The Tribunal unanimously accepted that this plea was admissible in principle, and by majority that it was applicable to the facts of one of the two cases. As to the principle, the Tribunal required France to show three things:

> "(1) The existence of very exceptional circumstances of extreme urgency involving medical or other considerations of an elementary nature, provided always that a prompt recognition of the existence of those exceptional circumstances is subsequently obtained from the other interested party or is clearly demonstrated.
>
> (2) The re-establishment of the original situation of compliance with the assignment in Hao as soon as the reasons of emergency invoked to justify the repatriation had disappeared.
>
> (3) The existence of a good-faith effort to try to obtain the consent of New Zealand in terms of the 1986 Agreement."[392]

In fact the danger to one of the officers, though perhaps not life-threatening, was real and might have been imminent, and it was not denied by the New Zealand physician who subsequently examined him. By contrast, in the case of the second officer, the justifications given (the need for medical examination on grounds of pregnancy and the desire to see a dying father) did not justify emergency action. The lives of the agent and the child were at no stage threatened and there were excellent medical facilities nearby. The Tribunal held that:

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[390] There have also been cases involving the violation of a land frontier in order to save the life of a person in danger. See, e.g., the case of violation of the Austrian border by Italian soldiers in 1862: *Secretariat Survey*, para. 121.

[391] *Rainbow Warrior (New Zealand/France), UNRIAA*, vol. XX, p. 217 (1990), at pp. 254-255, para. 78.

[392] Ibid., at p. 255, para. 79.

> "[C]learly these circumstances entirely fail to justify France's responsibility for the removal of Captain Prieur and from the breach of its obligations resulting from the failure to return the two officers to Hao (in the case of Major Mafart once the reasons for their removal had disappeared). There was here a clear breach of its obligations ..."[393]

(5) The plea of distress is also accepted in many treaties as a circumstance justifying conduct which would otherwise be wrongful. Article 14 (3) of the 1958 Convention on the Territorial Sea and the Contiguous Zone permits stopping and anchoring by ships during their passage through foreign territorial seas in so far as this conduct is rendered necessary by distress. This provision is repeated in much the same terms in article 18 (2) of the 1982 Convention on the Law of the Sea.[394] Similar provisions appear in the international conventions on the prevention of pollution at sea.[395]

(6) Article 24 is limited to cases where human life is at stake. The Tribunal in the *Rainbow Warrior* arbitration appeared to take a broader view of the circumstances justifying a plea of distress, apparently accepting that a serious health risk would suffice. The problem with extending article 24 to less than life-threatening situations is where to place any lower limit.

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[393] Ibid., at p. 263, para. 99.

[394] United Nations Convention on the Law of the Sea, Montego Bay, United Nations, *Treaty Series,* vol. 1833, p. 397; see also arts. 39 (1) (c), 98 and 109.

[395] See, e.g., International Convention for the Prevention of Pollution of the Sea by Oil, United Nations, *Treaty Series,* vol. 327, p. 3, art. IV (1) (a), providing that the prohibition on the discharge of oil into the sea does not apply if the discharge takes place "for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea". See also the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, United Nations, *Treaty Series*, vol. 1046, p. 138, art V (1), which provides that the prohibition on dumping of wastes does not apply when it is "necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea … in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping appears to be the only way of averting the threat …". Cf. also Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, Oslo, United Nations, *Treaty Series*, vol. 932, p. 3, art. 8 (1) International Convention for the Prevention of Pollution from Ships (MARPOL), United Nations, *Treaty Series,* vol. 1340, p. 184, Annex 1, regulation 11 (a).

In situations of distress involving aircraft there will usually be no difficulty in establishing that there is a threat to life, but other cases present a wide range of possibilities. Given the context of chapter V and the likelihood that there will be other solutions available for cases which are not apparently life-threatening, it does not seem necessary to extend the scope of distress beyond threats to life itself. In situations in which a State agent is in distress and has to act to save lives, there should however be a certain degree of flexibility in the assessment of the conditions of distress. The "no other reasonable way" criterion in article 24 seeks to strike a balance between the desire to provide some flexibility regarding the choices of action by the agent in saving lives and need to confine the scope of the plea having regard to its exceptional character.

(7) Distress may only be invoked as a circumstance precluding wrongfulness in cases where a State agent has acted to save his or her own life or where there exists a special relationship between the State organ or agent and the persons in danger. It does not extend to more general cases of emergencies, which are more a matter of necessity than distress.

(8) Article 24 only precludes the wrongfulness of conduct so far as it is necessary to avoid the life-threatening situation. Thus it does not exempt the State or its agent from complying with other requirements (national or international), e.g., the requirement to notify arrival to the relevant authorities, or to give relevant information about the voyage, the passengers or the cargo.[396]

(9) As in the case of *force majeure*, a situation which has been caused or induced by the invoking State is not one of distress. In many cases the State invoking distress may well have contributed, even if indirectly, to the situation. Priority should be given to necessary life-saving measures, however, and under subparagraph (2) (a), distress is only excluded if the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it. This is the same formula as that adopted in respect of article 23 (2) (a).[397]

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[396] See *Cushin and Lewis v. R*, [1935] Ex.C.R. 103 (even if a vessel enters a port in distress, it is not exempted from the requirement to report on its voyage). See also *The "Rebecca"* (United States of America-Mexico General Claims Commission) *A.J.I.L.* vol. 23 (1929), 860 (vessel entered port in distress; merchandise seized for customs offence: held, entry reasonably necessary in the circumstances and not a mere matter of convenience; seizure therefore unlawful); *"The May" v. R* [1931] S.C.R. 374; *The Ship "Queen City" v. R* [1931] S.C.R. 387; *R v. Flahaut* [1935] 2 D.L.R. 685 (test of "real and irresistible distress" applied).

[397] See commentary to article 23, para. (9).

(10) Distress can only preclude wrongfulness where the interests sought to be protected (e.g., the lives of passengers or crew) clearly outweigh the other interests at stake in the circumstances. If the conduct sought to be excused endangers more lives than it may save or is otherwise likely to create a greater peril it will not be covered by the plea of distress. For instance, a military aircraft carrying explosives might cause a disaster by making an emergency landing, or a nuclear submarine with a serious breakdown might cause radioactive contamination to a port in which it sought refuge. Subparagraph 2 (b) stipulates that distress does not apply if the act in question is likely to create a comparable or greater peril. This is consistent with paragraph 1, which in asking whether the agent had "no other reasonable way" to save life establishes an objective test. The words "comparable or greater peril" must be assessed in the context of the overall purpose of saving lives.

Article 25

Necessity

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
> (*a*) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>
> (*b*) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> (*a*) The international obligation in question excludes the possibility of invoking necessity; or
>
> (*b*) The State has contributed to the situation of necessity.

Commentary

(1) The term "necessity" ("état de necessité") is used to denote those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency. Under conditions narrowly defined in article 25, such a plea is recognized as a circumstance precluding wrongfulness.

(2) The plea of necessity is exceptional in a number of respects. Unlike consent (article 20), self-defence (article 21) or countermeasures (article 22), it is not dependent on the prior conduct of the injured State. Unlike *force majeure* (article 23), it does not involve conduct which is involuntary or coerced. Unlike distress (article 24), necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.[398]

(3) There is substantial authority in support of the existence of necessity as a circumstance precluding wrongfulness. It has been invoked by States and has been dealt with by a number of international tribunals. In these cases the plea of necessity has been accepted in principle, or at least not rejected.

(4) In an Anglo-Portuguese dispute of 1832, the Portuguese Government argued that the pressing necessity of providing for the subsistence of certain contingents of troops engaged in quelling internal disturbances, had justified its appropriation of property owned by British subjects, notwithstanding a treaty stipulation. The British Government was advised that …

> "the Treaties between this Country and Portugal are [not] of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary

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[398] Perhaps the classic case of such an abuse was the occupation of Luxembourg and Belgium by Germany in 1914, which Germany sought to justify on the ground of the necessity. See, in particular, the note presented on 2 August 1914 by the German Minister in Brussels to the Belgian Minister for Foreign Affairs, in J.B. Scott (ed)., *Diplomatic Documents Relating to the Outbreak of the European War* (New York, Oxford University Press, 1916), Part I, pp. 749-750, and the speech in the Reichstag by the German Chancellor, von Bethmann-Hollweg, on 4 August 1914, containing the well-known words "wir sind jetzt in der Notwehr; und Not kennt kein Gebot!" ("we are in a state of self-defence and necessity knows no law"). *Jahrbuch des Völkerrechts*, vol. III (1916), p. 728.

> to the safety, and even to the very existence of the State. The extent of the necessity, which will justify such an appropriation of the Property of British Subjects, must depend upon the circumstances of the particular case, but it must be imminent and urgent."[399]

(5) The "*Caroline*" incident of 1837, though frequently referred to as an instance of self-defence, really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it now has. In that case, British armed forces entered United States territory and attacked and destroyed a vessel owned by American citizens which was carrying recruits and military and other material to Canadian insurgents. In response to the American protests, the British Minister in Washington, Fox, referred to the "necessity of self-defence and self-preservation"; the same point was made by counsel consulted by the British Government, who stated that "the conduct of the British Authorities" was justified because it was "absolutely necessary as a measure of precaution".[400] Secretary of State Webster replied to Minister Fox that "nothing less than a clear and absolute necessity can afford ground of justification" for the commission "of hostile acts within the territory of a Power at Peace", and observed that the British Government must prove that the action of its forces had really been caused by "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation".[401] In his message to Congress of 7 December 1841, President Tyler reiterated that:

> "This Government can never concede to any foreign Government the power, except in a case of the most urgent and extreme necessity, of invading its territory, either to arrest the persons or destroy the property of those who may have violated the municipal laws of such foreign Government ..."[402]

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[399] A.D. McNair (ed)., *International Law Opinions* (Cambridge, University Press, 1956), vol. II, p. 232.

[400] See respectively W.R. Manning (ed.), *Diplomatic Correspondence of the United States: Canadian Relations 1784-1860* (Washington, Carnegie Endowment for International Peace, 1943), vol. III, p. 422; A.D. McNair (ed), *International Law Opinions* (Cambridge, University Press, 1956), vol. II, p. 22.

[401] *British and Foreign State Papers*, vol. 29, p. 1129.

[402] *British and Foreign State Papers*, vol. 30, p. 194.

The incident was not closed until 1842, with an exchange of letters in which the two Governments agreed that "a strong overpowering necessity may arise when this great principle may and must be suspended". "It must be so", added Lord Ashburton, the British Government's ad hoc envoy to Washington, "for the shortest possible period during the continuance of an admitted overruling necessity, and strictly confined within the narrowest limits imposed by that necessity."[403]

(6) In the "Russian Fur Seals" controversy of 1893, the "essential interest" to be safeguarded against a "grave and imminent peril" was the natural environment in an area not subject to the jurisdiction of any State or to any international regulation. Facing the danger of extermination of a fur seal population by unrestricted hunting, the Russian Government issued a decree prohibiting sealing in an area of the high seas. In a letter to the British Ambassador dated 12/24 February 1893, the Russian Minister for Foreign Affairs explained that the action had been taken because of the "absolute necessity of immediate provisional measures" in view of the imminence of the hunting season. He "emphasize[d] the essentially precautionary character of the above-mentioned measures, which were taken under the pressure of exceptional circumstances"[404] and declared his willingness to conclude an agreement with the British Government with a view to a longer-term settlement of the question of sealing in the area.

(7) In the *Russian Indemnity* case, the Ottoman Government, to justify its delay in paying its debt to the Russian Government, invoked among other reasons the fact that it had been in an extremely difficult financial situation, which it described as *"force majeure"* but which was more like a state of necessity. The arbitral tribunal accepted the plea in principle:

> "*The exception of force majeure*, invoked in the first place, is arguable in international public law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits ... that the obligation for a State to execute treaties may be weakened 'if the very existence of the State is endangered, if observation of the international duty is ... *self-destructive*'."[405]

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[403] Ibid., p. 195. See Secretary of State Webster's reply: ibid., p. 201.

[404] *British and Foreign State Papers*, vol. 86, p. 220; *Secretariat Survey*, para. 155.

[405] *UNRIAA*., vol. XI, p. 431 (1912), at p. 443; *Secretariat Survey*, para. 394.

It considered, however, that:

> "It would be a manifest exaggeration to admit that the payment (or the contracting of a loan for the payment) of the relatively small sum of 6 million francs due to the Russian claimants would have imperilled the existence of the Ottoman Empire or seriously endangered its internal or external situation ..."[406]

In its view, compliance with an international obligation must be "self-destructive" for the wrongfulness of the conduct not in conformity with the obligation to be precluded.[407]

(8) In *Société Commerciale de Belgique*,[408] the Greek Government owed money to a Belgian company under two arbitral awards. Belgium applied to the Permanent Court of International Justice for a declaration that the Greek Government, in refusing to carry out the awards, was in breach of its international obligations. The Greek Government pleaded the country's serious budgetary and monetary situation.[409] The Court noted that it was not within its mandate to declare whether the Greek Government was justified in not executing the arbitral awards. However, the Court implicitly accepted the basic principle, on which the two parties were in agreement.[410]

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[406] Ibid.

[407] A case in which the parties to the dispute agreed that very serious financial difficulties could justify a different mode of discharging the obligation other than that originally provided for arose in connection with the enforcement of the arbitral award in *Forests of Central Rhodope*, *UNRIAA*, vol. III, p. 1405 (1933): see League of Nations, *Official Journal*, 15th year, No. 11 (Part I) (November 1934), p. 1432.

[408] *Société Commerciale de Belgique, 1939, P.C.I.J., Series A/B, No. 78*, p. 160.

[409] *P.C.I.J., Series C, No. 87*, pp. 141, 190; *Secretariat Survey*, para. 278. See generally for the Greek arguments relative to the state of necessity, ibid., paras. 276-287.

[410] *Société Commerciale de Belgique, 1939, P.C.I.J., Series A/B, No. 78*, p. 160; *Secretariat Survey*, para. 288. See also the *Serbian Loans* case, where the positions of the parties and the Court on the point were very similar: *Serbian Loans, 1929, P.C.I.J., Series A, No. 20*; *Secretariat Survey*, paras. 263-268; *French Company of Venezuela Railroads*, *UNRIAA*., vol. X, p. 285 (1902), at p. 353; *Secretariat Survey*, paras. 385-386. In his separate opinion in the *Oscar Chinn* case, Judge Anzilotti accepted the principle that "necessity may excuse the non-observance of international obligations" but denied its applicability on the facts: *Oscar Chinn, 1934, P.C.I.J., Series A/B, No. 63*, p. 65, at pp. 112-114.

(9) In March 1967 the Liberian oil tanker *Torrey Canyon* went aground on submerged rocks off the coast of Cornwall outside British territorial waters, spilling large amounts of oil which threatened the English coastline. After various remedial attempts had failed, the British Government decided to bomb the ship to burn the remaining oil. This operation was carried out successfully. The British Government did not advance any legal justification for its conduct, but stressed the existence of a situation of extreme danger and claimed that the decision to bomb the ship had been taken only after all other means had failed.[411] No international protest resulted. A convention was subsequently concluded to cover future cases where intervention might prove necessary to avert serious oil pollution.[412]

(10) In the *Rainbow Warrior* arbitration, the Arbitral Tribunal expressed doubt as to the existence of the excuse of necessity. It noted that the Commission's draft article "allegedly authorizes a State to take unlawful action invoking a state of necessity" and described the Commission's proposal as "controversial".[413]

(11) By contrast, in the *Gabčíkovo-Nagymaros Project* case,[414] the International Court carefully considered an argument based on the Commission's draft article (now article 25), expressly accepting the principle while at the same time rejecting its invocation in the circumstances of that case. As to the principle itself, the International Court noted that the parties had both relied on the Commission's draft article as an appropriate formulation, and continued:

> "The Court considers… that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding

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[411] *The "Torrey Canyon"*, Cmnd. 3246 (London, Her Majesty's Stationery Office, 1967).

[412] International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, United Nations, *Treaty Series*, vol. 970, p. 211.

[413] *Rainbow Warrior (New Zealand/France), UNRIAA.*, vol. XX, p. 217 (1990), at p. 254. In *Libyan Arab Foreign Investment Company v. Republic of Burundi,* (1994), *I.L.R.*, vol. 96, p. 279 at p. 319, the tribunal declined to comment on the appropriateness of codifying the doctrine of necessity, noting that the measures taken by Burundi did not appear to have been the only means of safeguarding an essential interest against a grave and imminent peril.

[414] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997*, p. 7.

wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words... Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met. In the present case, the following basic conditions... are relevant: it must have been occasioned by an 'essential interest' of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a 'grave and imminent peril'; the act being challenged must have been the 'only means' of safeguarding that interest; that act must not have 'seriously impair[ed] an essential interest' of the State towards which the obligation existed; and the State which is the author of that act must not have 'contributed to the occurrence of the state of necessity'. Those conditions reflect customary international law."[415]

(12) The plea of necessity was apparently in issue in the *Fisheries Jurisdiction* case.[416] Regulatory measures taken to conserve straddling stocks had been taken by the Northwest Atlantic Fisheries Organization but had, in Canada's opinion, proved ineffective for various reasons. By the Coastal Fisheries Protection Act 1994, Canada declared that the straddling stocks of the Grand Banks were "threatened with extinction", and asserted that the purpose of the Act and regulations was "to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding". Canadian officials subsequently boarded and seized a Spanish fishing ship, the *Estai*, on the high seas, leading to a conflict with the European Union and with Spain. The Spanish Government denied that the arrest could be justified by concerns as to conservation "since it violates the established provisions of the NAFO Convention to which Canada is a party".[417] Canada disagreed, asserting that "the arrest

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[415] Ibid., at pp. 40-41, paras. 51-52.

[416] *Fisheries Jurisdiction (Spain v. Canada), I.C.J. Reports 1998*, p. 431.

[417] As cited in the Court's judgment: *I.C.J. Reports 1998*, p. 431 at p. 443, para. 20. For the EU protest of 10 March 1995, asserting that the arrest "cannot be justified by any means" see Mémoire Du Royaume d'Espagne (September 1995), para. 15.

of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen".[418] The Court held that it had no jurisdiction over the case.[419]

(13) The existence and limits of a plea of necessity have given rise to a long-standing controversy among writers. It was for the most part explicitly accepted by the early writers, subject to strict conditions.[420] In the nineteenth century, abuses of necessity associated with the idea of "fundamental rights of States" led to a reaction against the doctrine. During the twentieth century, the number of writers opposed to the concept of state of necessity in international law increased, but the balance of doctrine has continued to favour the existence of the plea.[421]

(14) On balance, State practice and judicial decisions support the view that necessity may constitute a circumstance precluding wrongfulness under certain very limited conditions, and this view is embodied in article 25. The cases show that necessity has been invoked to preclude the

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[418] I.C.J. reports 1998, p. 431 at p. 443, para. 20. See further the Canadian Counter-Memorial (February 1996), paras. 17-45.

[419] By an Agreed Minute between the EU and Canada, Canada undertook to repeal the regulations applying the 1994 Act to Spanish and Portuguese vessels in the NAFO area and to release the *Estai*. The parties expressly maintained their respective positions "on the conformity of the amendment of 25 May 1994 to Canada's Coastal Fisheries Protection Act, and subsequent regulations, with customary international law and the NAFO Convention" and reserved "their ability to preserve and defend their rights in conformity with international law". See Canada-European Community, Agreed Minute on the Conservation and Management of Fish Stocks, Brussels, 20 April 1995, *I.L.M* (1995), vol. 34 p. 1260. See also the Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 8 September 1995, A/CONF.164/37.

[420] See B. Ayala, *De jure et officiis bellicis et disciplina militari, libri tres* (1582, repr. Washington, Carnegie Institution, 1912), vol. II, p. 135; A. Gentili, *De iure belli, libri tres* (1612, repr. Oxford, Clarendon Press, 1933), vol. II, p. 351; H. Grotius, *De jure belli ac pacis, libri tres* (1646, repr. Oxford, Clarendon Press, 1925), vol. II, p. 193; S. Pufendorf, *De jure naturae et gentium, libri octo* (1688, repr. Oxford, Clarendon Press, 1934), vol. II, pp. 295-296; C. Wolff, *Jus gentium methodo scientifica pertractatum* (1764, repr. Oxford, Clarendon Press, 1934), vol. II, pp. 173-174; E. de Vattel, *Le droit des gens ou principes de la loi naturelle* (1758, repr. Washington, Carnegie Institution, 1916), vol. III, p. 149.

[421] For a review of the earlier doctrine, see Yearbook ... 1980, vol. II, Part One, pp. 47-49; and see also P.A. Pillitu, *Lo stato di necessita nel diritto internazionale* (Perugia, Universita di Perugia/Editrici Licosa, 1981); J. Barboza, "Necessity (Revisited) in International Law", in J. Makarczyk (ed.), *Essays in Honour of Judge Mafred Lachs* (The Hague, Martinus Nijhoff, 1984), p. 27; R. Boed, "State of Necessity as a Justification for Internationally Wrongful Conduct", *Yale Human Rights & Development Law Journal*, vol. 3 (2000) p. 1.

wrongfulness of acts contrary to a broad range of obligations, whether customary or conventional in origin.[422] It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population. But stringent conditions are imposed before any such plea is allowed. This is reflected in article 25. In particular, to emphasize the exceptional nature of necessity and concerns about its possible abuse, article 25 is cast in negative language ("Necessity may not be invoked… unless").[423] In this respect it mirrors the language of article 62 of the Vienna Convention on the Law of Treaties dealing with fundamental change of circumstances. It also mirrors that language in establishing, in paragraph (1), two conditions without which necessity may not be invoked and excluding, in paragraph (2), two situations entirely from the scope of the excuse of necessity.[424]

(15) The first condition, set out in subparagraph (1) (a), is that necessity may only be invoked to safeguard an essential interest from a grave and imminent peril. The extent to which a given interest is "essential" depends on all the circumstances, and cannot be prejudged. It extends to particular interests of the State and its people, as well as of the international community as a whole. Whatever the interest may be, however, it is only when it is threatened by a grave and imminent peril that this condition is satisfied. The peril has to be objectively established and not merely apprehended as possible. In addition to being grave, the peril has to be imminent in the sense of proximate. However, as the Court in the *Gabčíkovo-Nagymaros Project* case said:

> "That does not exclude … that a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable."[425]

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[422] Generally on the irrelevance of the source of the obligation breached, see article 12 and commentary.

[423] This negative formulation was referred to by the Court in *Gabčíkovo-Nagymaros Project, I.C.J. Reports 1997*, p. 7, at p. 40, para. 51.

[424] A further exclusion, common to all the circumstances precluding wrongfulness, concerns peremptory norms: see article 26 and commentary.

[425] I.C.J. Reports 1997, p. 42, para. 54.

Moreover the course of action taken must be the "only way" available to safeguard that interest. The plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient. Thus in the *Gabčíkovo-Nagymaros Project* case, the Court was not convinced that the unilateral suspension and abandonment of the Project was the only course open in the circumstances, having regard in particular to the amount of work already done and the money expended on it, and the possibility of remedying any problems by other means.[426] The word "ways" in subparagraph (1) (a) is not limited to unilateral action but may also comprise other forms of conduct available through cooperative action with other States or through international organizations (for example, conservation measures for a fishery taken through the competent regional fisheries agency). Moreover the requirement of necessity is inherent in the plea: any conduct going beyond what is strictly necessary for the purpose will not be covered.

(16) It is not sufficient for the purposes of subparagraph (1) (a) that the peril is merely apprehended or contingent. It is true that in questions relating, for example, to conservation and the environment or to the safety of large structures, there will often be issues of scientific uncertainty and different views may be taken by informed experts on whether there is a peril, how grave or imminent it is and whether the means proposed are the only ones available in the circumstances. By definition, in cases of necessity the peril will not yet have occurred. In the *Gabčíkovo-Nagymaros Project* case the Court noted that the invoking State could not be the sole judge of the necessity,[427] but a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time.

(17) The second condition for invoking necessity, set out in subparagraph (1) (b), is that the conduct in question must not seriously impair an essential interest of the other State or States concerned, or of the international community as a whole.[428] In other words, the interest relied on

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[426] Ibid., pp. 42-43, para. 55.

[427] Ibid., p. 40, para. 51.

[428] See para. (18) of the commentary, below.

must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective.[429]

(18) As a matter of terminology, it is sufficient to use the phrase "international community as a whole" rather than "international community of States as a whole", which is used in the specific context of article 53 of the Vienna Convention on the Law of Treaties. The insertion of the words "of States" in article 53 of the Vienna Convention was intended to stress the paramountcy that States have over the making of international law, including especially the establishment of norms of a peremptory character. On the other hand the International Court used the phrase "international community as a whole" in the *Barcelona Traction* case,[430] and it is frequently used in treaties and other international instruments in the same sense as in article 25 (1) (b).[431]

(19) Over and above the conditions in article 25 (1), article 25 (2) lays down two general limits to any invocation of necessity. This is made clear by the use of the words "in any case". subparagraph (2) (a) concerns cases where the international obligation in question explicitly or implicitly excludes reliance on necessity. Thus certain humanitarian conventions applicable to

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[429] In the *Gabčikovo-Nagymaros Project* case the Court affirmed the need to take into account any countervailing interest of the other State concerned: *I.C.J. Reports 1997,* p. 7, at p. 46, para. 58.

[430] *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970,* p. 3, at p. 32, para. 33.

[431] See, e.g., Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, United Nations, *Treaty Series,* vol. 1035, p. 167, preambular para. 3; International Convention against the Taking of Hostages, United Nations, *Treaty Series*, vol. 1316, p. 205, preambular para. 4; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March 1988, I.M.O. Document SUA/CONF/15/Rev.1; *I.L.M.,* vol. 27 (1988), p. 665, preambular para. 5; Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, (A/RES/49/59), preambular para. 3; International Convention for the Suppression of Terrorist Bombings, 15 December 1997, A/RES/52/164, preambular para. 10; Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, preambular para. 9; International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, A/RES/54/109, opened for signature 10 January 2000, preambular para. 9.

armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.

(20) According to subparagraph (2) (b), necessity may not be relied on if the responsible State has contributed to the situation of necessity. Thus in the *Gabčíkovo-Nagymaros Project* case, the Court considered that because Hungary had "helped, by act or omission to bring" about the situation of alleged necessity, it could not now rely on that situation as a circumstance precluding wrongfulness.[432] For a plea of necessity to be precluded under subparagraph (2) (b), the contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral. Subparagraph (2) (b) is phrased in more categorical terms than articles 23 (2) (a) and 24 (2) (a), because necessity needs to be more narrowly confined.

(20) As embodied in article 25, the plea of necessity is not intended to cover conduct which is in principle regulated by the primary obligations. This has a particular importance in relation to the rules relating to the use of force in international relations and to the question of "military necessity". It is true that in a few cases, the plea of necessity has been invoked to excuse military action abroad, in particular in the context of claims to humanitarian intervention.[433] The question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law is not covered by article 25.[434] The same thing is true of the doctrine of "military necessity" which is, in the first place, the underlying criterion for a series of substantive rules of the law of war and neutrality, as well as being included in terms in a number of treaty

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[432] *"I.C.J. Reports 1997"*, p. 7, at p. 46, para. 57.

[433] E.g., in 1960 Belgium invoked necessity to justify its military intervention in the Congo. The matter was discussed in the Security Council but not in terms of the plea of necessity as such. See *S.C.O.R., Fifteenth Year*, 873rd meeting., 13/14 July 1960, paras. 144, 182, 192; 877th meeting., 20/21 July 1960, paras. 31 ff, 142; 878th meeting., 21 July 1960, paras. 23, 65; 879th meeting., 21/22 July 1960, paras. 80 ff, 118, 151. For the *"Caroline"* incident, see above, para. (5).

[434] See also article 26 and commentary for the general exclusion of from the scope of circumstances precluding wrongfulness of conduct in breach of a peremptory norm.

provisions in the field of international humanitarian law.[435] In both respects, while considerations akin to those underlying article 25 may have a role, they are taken into account in the context of the formulation and interpretation of the primary obligations.[436]

Article 26

Compliance with peremptory norms

> Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Commentary

(1) In accordance with article 53 of the Vienna Convention on the Law of Treaties, a treaty which conflicts with a peremptory norm of general international law is void. Under article 64, an earlier treaty which conflicts with a new peremptory norm becomes void and terminates.[437] The question is what implications these provisions may have for the matters dealt with in chapter V.

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[435] See e.g. art. 23 (g) of the Hague Regulations respecting the Laws and Customs of War on Land (annexed to Convention II of 1899 and Convention IV of 1907), which prohibits the destruction of enemy property "unless such destruction or seizure be imperatively demanded by the necessities of war": J.B. Scott (ed.), *The Proceedings of the Hague Peace Conferences: the Conference of 1907* (New York, Oxford University Press, 1920) vol. I, p. 623. Similarly, art. 54 (5) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), United Nations, *Treaty Series,* vol. 1125, p. 3, appears to permit attacks on objects indispensable to the survival of the civilian population if "imperative military necessity" so requires.

[436] See e.g., M. Huber, "Die kriegsrechtlichen Verträge und die Kriegsraison", *Zeitschrift für Völkerrecht*, vol. VII (1913), p. 351; D. Anzilotti, *Corso di diritto internazionale* (Rome, Athenaeum, 1915), vol. III, p. 207; C. de Visscher, "Les lois de la guerre et la théorie de la nécessité", *R.G.D.I.P.*, vol. XXIV (1917), p. 74; N.C.H. Dunbar, "Military necessity in war crimes trials", *B.Y.I.L.*, vol. 29 (1952), p. 442; C. Greenwood, "Historical Development and Legal Basis", in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford, Oxford University Press, 1995), p. 1 at pp. 30-33; Y. Dinstein, "Military Necessity", in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam, North Holland, 1997), vol. III, pp. 395-397.

[437] Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331. See also art. 44 (5), which provides that in cases falling under art. 53, no separation of the provisions of the treaty is permitted.

(2) Fitzmaurice as Special Rapporteur on the Law of Treaties treated this question on the basis of an implied condition of "continued compatibility with international law", noting that:

> "A treaty obligation the observance of which is incompatible with a new rule or prohibition of international law in the nature of *jus cogens* will justify (and require) non-observance of any treaty obligation involving such incompatibility… The same principle is applicable where circumstances arise subsequent to the conclusion of a treaty, bringing into play an existing rule of international law which was not relevant to the situation as it existed at the time of the conclusion of the treaty."[438]

The Commission did not however propose any specific articles on this question, apart from articles 53 and 64 themselves.

(3) Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The processes of interpretation and application should resolve such questions without any need to resort to the secondary rules of State responsibility. In theory one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred.[439] Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts.

(4) It is however desirable to make it clear that the circumstances precluding wrongfulness in chapter V of Part One do not authorize or excuse any derogation from a peremptory norm of general international law. For example, a State taking countermeasures may not derogate from

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[438] Fitzmaurice, "Fourth Report on the Law of Treaties", *Yearbook ... 1959*, vol. II, p. 46. See also S. Rosenne, *Breach of Treaty* (Cambridge, Grotius, 1985), p. 63.

[439] For a possible analogy see the remarks of Judge ad hoc Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 325, at pp. 439-441. The Court did not address these issues in its Order.

such a norm: for example, a genocide cannot justify a counter-genocide.[440] The plea of necessity likewise cannot excuse the breach of a peremptory norm. It would be possible to incorporate this principle expressly in each of the articles of chapter V, but it is both more economical and more in keeping with the overriding character of this class of norms to deal with the basic principle separately. Hence article 26 provides that nothing in chapter V can preclude the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.[441]

(5) The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law, binding as such, but further that it should be recognized as having a peremptory character by the international community of States as a whole. So far, relatively few peremptory norms have been recognized as such. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties.[442] Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.[443]

(6) In accordance with article 26, circumstances precluding wrongfulness cannot justify or excuse a breach of a State's obligations under a peremptory rule of general international law. Article 26 does not address the prior issue whether there has been such a breach in any given

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[440] As the International Court noted in its decision on counterclaims in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, "in no case could one breach of the Convention serve as an excuse for another": *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-Claims, I.C.J. Reports 1997*, p. 243, at p. 258, para. 35.

[441] For convenience this limitation is spelt out again in the context of countermeasures in Part Three, chapter II. See article 50 and commentary, paras.(9) and (10).

[442] See, e.g. the decisions of the International Criminal Tribunal for the former Yugoslavia in Case IT-95-17/1-T, *Prosecutor v. Anto Furundzija*, judgment of 10 December 1998; *I.L.M.*, vol. 38 (1999), p. 317, and of the English House of Lords in *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* [1999] 2 All ER 97, esp. at pp. 108-109, and 114-115 (Lord Browne-Wilkinson). Cf. *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996*, p. 226, at p. 257, para. 79.

[443] Cf. *East Timor (Portugal v. Australia), I.C.J. Reports 1995*, p. 90, at p. 102, para.. 29.

case. This has particular relevance to certain articles in chapter V. One State cannot dispense another from the obligation to comply with a peremptory norm, e.g. in relation to genocide or torture, whether by treaty or otherwise.[444] But in applying some peremptory norms the consent of a particular State may be relevant. For example, a State may validly consent to a foreign military presence on its territory for a lawful purpose. Determining in which circumstances consent has been validly given is again a matter for other rules of international law and not for the secondary rules of State responsibility.[445]

Article 27

Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(*a*) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) The question of compensation for any material loss caused by the act in question.

Commentary

(1) Article 27 is a without prejudice clause dealing with certain incidents or consequences of invoking circumstances precluding wrongfulness under chapter V. It deals with two issues. First, it makes it clear that circumstances precluding wrongfulness do not as such affect the underlying obligation, so that if the circumstance no longer exists the obligation regains full force and effect. Second, it refers to the possibility of compensation in certain cases. Article 27 is framed as a without prejudice clause, because, as to the first point, it may be that the effect of the facts which disclose a circumstance precluding wrongfulness may also give rise to the termination of the obligation, and as to the second point, because it is not possible to specify in general terms when compensation is payable.

(2) Subparagraph (a) of article 27 addresses the question of what happens when a condition preventing compliance with an obligation no longer exists or gradually ceases to operate. It makes it clear that chapter V has a merely preclusive effect. When and to the extent that a

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[444] See commentary to article 45, para (4).

[445] See commentary to article 20, paras. (4)-(7).

circumstance precluding wrongfulness ceases, or ceases to have its preclusive effect for any reason, the obligation in question (assuming it is still in force) will again have to be complied with, and the State whose earlier non-compliance was excused must act accordingly. The words "and to the extent" are intended to cover situations in which the conditions preventing compliance gradually lessen and allow for partial performance of the obligation.

(3) This principle was affirmed by the Tribunal in the *Rainbow Warrior* arbitration,[446] and even more clearly by the International Court in the *Gabčíkovo-Nagymaros Project* case.[447] In considering Hungary's argument that the wrongfulness of its conduct in discontinuing work on the Project was precluded by a state of necessity, the Court remarked that " [a]s soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives."[448]

It may be that the particular circumstances precluding wrongfulness are, at the same time, a sufficient basis for terminating the underlying obligation. Thus a breach of a treaty justifying countermeasures may be "material" in terms of article 60 of the 1969 Vienna Convention and permit termination of the treaty by the injured State. Conversely, the obligation may be fully reinstated or its operation fully restored in principle, but modalities for resuming performance may need to be settled. These are not matters which article 27 can resolve, other than by providing that the invocation of circumstances precluding wrongfulness is without prejudice to "compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists". Here "compliance with the obligation in question" includes cessation of the wrongful conduct.

(4) Subparagraph (b) of article 27 is a reservation as to questions of possible compensation for damage in cases covered by chapter V. Although article 27 (b) uses the term "compensation", it is not concerned with compensation within the framework of reparation for wrongful conduct, which is the subject of article 34. Rather it is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any material loss suffered by any State directly affected. The reference

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[446] *Rainbow Warrior (New Zealand/France), UNRIAA.*, vol. XX, p. 217 (1990), at pp. 251-252, para. 75.

[447] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997,* p. 7.

[448] Ibid., at p. 63, para 101; see also ibid., at p. 38, para. 47.

to "material loss" is narrower than the concept of damage elsewhere in the articles: article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V.

(5) Subparagraph (b) is a proper condition, in certain cases, for allowing a State to rely on a circumstance precluding wrongfulness. Without the possibility of such recourse the State whose conduct would otherwise be unlawful might seek to shift the burden of the defence of its own interests or concerns on to an innocent third State. This principle was accepted by Hungary in invoking the plea of necessity in the *Gabčikovo-Nagymaros Project* case. As the Court noted, "Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner."[449].

(6) Subparagraph (b) does not attempt to specify in what circumstances compensation should be payable. Generally the range of possible situations covered by chapter V is such that to lay down a detailed regime for compensation is not appropriate. It will be for the State invoking a circumstance precluding wrongfulness to agree with any affected States on the possibility and extent of compensation payable in a given case.

PART TWO

CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

(1) Whereas Part One of the Articles defines the general conditions necessary for State responsibility to arise, Part Two deals with the legal consequences for the responsible State. It is true that a State may face legal consequences of conduct which is internationally wrongful outside the sphere of State responsibility. For example, a material breach of a treaty may give an injured State the right to terminate or suspend the treaty in whole or in part.[450] The focus of Part Two, however, is on the new legal relationship which arises upon the commission by a State of an internationally wrongful act. This constitutes the substance or content of the international responsibility of a State under the Articles.

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[449] Ibid., at p. 39, para. 48. A separate issue was that of accounting for accrued costs associated with the Project: ibid., at p. 81, paras. 152-153.

[450] Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 60.

(2) Within the sphere of State responsibility, the consequences which arise by virtue of an internationally wrongful act of a State may be specifically provided for in such terms as to exclude other consequences, in whole or in part.[451] In the absence of any specific provision, however, international law attributes to the responsible State new obligations, and in particular the obligation to make reparation for the harmful consequences flowing from that act. The close link between the breach of an international obligation and its immediate legal consequence in the obligation of reparation was recognized in article 36 (2) of the Statute of the Permanent Court of International Justice, which was carried over without change as article 36 (2) of the Statute of the International Court. In accordance with article 36 (2), States parties to the Statute may recognize as compulsory the Court's jurisdiction, *inter alia*, in all legal disputes concerning …

> "(*c*) the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> (*d*) the nature or extent of the reparation to be made for the breach of an international obligation."

Part One of the Articles sets out the general legal rules applicable to the question identified in subparagraph (c), while Part Two does the same for subparagraph (d).

(3) Part Two consists of three chapters. Chapter I sets out certain general principles and specifies more precisely the scope of Part Two. Chapter II focuses on the forms of reparation (restitution, compensation, satisfaction) and the relations between them. Chapter III deals with the special situation which arises in case of a serious breach of an obligation arising under a peremptory norm of general international law, and specifies certain legal consequences of such breaches, both for the responsible State and for other States.

Chapter I

General principles

(1) Chapter I of Part Two comprises six articles, which define in general terms the legal consequences of an internationally wrongful act of a State. Individual breaches of international law can vary across a wide spectrum from the comparatively trivial or minor up to cases which imperil the survival of communities and peoples, the territorial integrity and political independence of States and the environment of whole regions. This may be true whether the

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[451] On the *lex specialis* principle in relation to State responsibility see article 55 and commentary.

obligations in question are owed to one other State or to some or all States or to the international community as a whole. But over and above the gravity or effects of individual cases, the rules and institutions of State responsibility are significant for the maintenance of respect for international law and for the achievement of the goals which States advance through law-making at the international level.

(2) Within chapter I, article 28 is an introductory article, affirming the principle that legal consequences are entailed whenever there is an internationally wrongful act of that State. Article 29 indicates that these consequences are without prejudice to, and do not supplant, the continued obligation of the responsible State to perform the obligation breached. This point is carried further by article 30, which deals with the obligation of cessation and assurances or guarantees of non-repetition. Article 31 sets out the general obligation of reparation for injury suffered in consequence of a breach of international law by a State. Article 32 makes clear that the responsible State may not rely on its internal law to avoid the obligations of cessation and reparation arising under Part Two. Finally, article 33 specifies the scope of the Part, both in terms of the States to which obligations are owed and also in terms of certain legal consequences which, because they accrue directly to persons or entities other than States, are not covered by Parts Two or Three of the Articles.

Article 28

Legal consequences of an internationally wrongful act

> The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of Part One involves legal consequences as set out in this Part.

Commentary

(1) Article 28 serves an introductory function for Part Two and is expository in character. It links the provisions of Part One which define when the international responsibility of a State arises with the provisions of Part Two which set out the legal consequences which responsibility for an internationally wrongful act involves.

(2) The core legal consequences of an internationally wrongful act set out in Part Two are the obligations of the responsible State to cease the wrongful conduct (article 30) and to make full reparation for the injury caused by the internationally wrongful act (article 31). Where the internationally wrongful act constitutes a serious breach by the State of an obligation arising under a peremptory norm of general international law, the breach may entail further

consequences both for the responsible State and for other States. In particular, all States in such cases have obligations to cooperate to bring the breach to an end, not to recognize as lawful the situation created by the breach, and not to render aid or assistance to the responsible State in maintaining the situation so created (articles 40, 41).

(3) Article 28 does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations *of* the State and not only those owed *to* other States. Thus State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State. However, while Part One applies to all the cases in which an internationally wrongful act may be committed by a State, Part Two has a more limited scope. It does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State. In other words, the provisions of Part Two are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State, and article 33 makes this clear.

Article 29

Continued duty of performance

> The legal consequences of an internationally wrongful act under this Part do not affect the continued duty of the responsible State to perform the obligation breached.

Commentary

(1) Where a State commits a breach of an international obligation, questions as to the restoration and future of the legal relationship thereby affected are central. Apart from the question of reparation, two immediate issues arise, namely, the effect of the responsible State's conduct on the obligation which has been breached, and cessation of the breach if it is continuing. The former question is dealt with by article 29, the latter by article 30.

(2) Article 29 states the general principle that the legal consequences of an internationally wrongful act do not affect the continued duty of the State to perform the obligation it has breached. As a result of the internationally wrongful act, a new set of legal relations is

established between the responsible State and the State or States to whom the international obligation is owed. But this does not mean that the pre-existing legal relation established by the primary obligation disappears. Even if the responsible State complies with its obligations under Part Two to cease the wrongful conduct and to make full reparation for the injury caused, it is not relieved thereby of the duty to perform the obligation breached. The continuing obligation to perform an international obligation, notwithstanding a breach, underlies the concept of a continuing wrongful act (see article 14) and the obligation of cessation (see article 30 (a)).

(3) It is true that in some situations the ultimate effect of a breach of an obligation may be to put an end to the obligation itself. For example a State injured by a material breach of a bilateral treaty may elect to terminate the treaty.[452] But as the relevant provisions of the Vienna Convention on the Law of Treaties make clear, the mere fact of a breach and even of a repudiation of a treaty does not terminate the treaty.[453] It is a matter for the injured State to react to the breach to the extent permitted by the Vienna Convention. The injured State may have no interest in terminating the treaty as distinct from calling for its continued performance. Where a treaty is duly terminated for breach, the termination does not affect legal relationships which have accrued under the treaty prior to its termination, including the obligation to make reparation for any breach.[454] A breach of an obligation under general international law is even less likely to affect the underlying obligation, and indeed will never do so *as such*. By contrast the secondary legal relation of State responsibility arises on the occurrence of a breach and without any requirement of invocation by the injured State.

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[452] Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 60.

[453] Indeed in the *Gabčíkovo-Nagymaros Project* case, the Court held that continuing material breaches by both parties did not have the effect of terminating the 1977 Treaty: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997*, p. 7, at p. 68, para. 114.

[454] See e.g. *Rainbow Warrior (New Zealand/France), UNRIAA*, vol. XX, p. 217 (1990), at p. 266, citing President McNair (dissenting) in *Ambatielos, Preliminary Objection, I.C.J. Reports 1952*, p. 28, at p. 63. On that particular point the Court itself agreed: ibid., at p. 45. In the *Gabčíkovo-Nagymaros Project* case, Hungary accepted that the legal consequences of its termination of the 1977 Treaty on account of Czechoslovakia's breach were prospective only, and did not affect the accrued rights of either party: *I.C.J. Reports 1997*, p. 7, at pp. 73-74, paras. 125-127. The Court held that the Treaty was still in force, and therefore did not address the question.

(4) Article 29 does not need to deal with such contingencies. All it provides is that the legal consequences of an internationally wrongful act within the field of State responsibility do not affect any continuing duty to comply with the obligation which has been breached. Whether and to what extent that obligation subsists despite the breach is a matter not regulated by the law of State responsibility but by the rules concerning the relevant primary obligation.

Article 30

Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(*a*) To cease that act, if it is continuing;

(*b*) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Commentary

(1) Article 30 deals with two separate but linked issues raised by the breach of an international obligation: the cessation of the wrongful conduct and the offer of assurances and guarantees of non-repetition by the responsible State if circumstances so require. Both are aspects of the restoration and repair of the legal relationship affected by the breach. Cessation is, as it were, the negative aspect of future performance, concerned with securing an end to continuing wrongful conduct, whereas assurances and guarantees serve a preventive function and may be described as a positive reinforcement of future performance. The continuation in force of the underlying obligation is a necessary assumption of both, since if the obligation has ceased following its breach, the question of cessation does not arise and no assurances and guarantees can be relevant.[455]

(2) Subparagraph (a) of article 30 deals with the obligation of the State responsible for the internationally wrongful act to cease the wrongful conduct. In accordance with article 2, the word "act" covers both acts and omissions. Cessation is thus relevant to all wrongful acts extending in time "regardless of whether the conduct of a State is an action or omission … since there may be cessation consisting in abstaining from certain actions …".[456]

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[455] Cf. Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 70 (1).

[456] *Rainbow Warrior, UNRIAA*, vol. XX, p. 217 (1990), at p. 270, para. 113.

(3) The Tribunal in the *Rainbow Warrior* arbitration stressed "two essential conditions intimately linked" for the requirement of cessation of wrongful conduct to arise, "namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued".[457] While the obligation to cease wrongful conduct will arise most commonly in the case of a continuing wrongful act,[458] article 30 also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions. The phrase "if it is continuing" at the end of subparagraph (a) of the article is intended to cover both situations.

(4) Cessation of conduct in breach of an international obligation is the first requirement in eliminating the consequences of wrongful conduct. With reparation, it is one of the two general consequences of an internationally wrongful act. Cessation is often the main focus of the controversy produced by conduct in breach of an international obligation.[459] It is frequently demanded not only by States but also by the organs of international organizations such as the General Assembly and Security Council in the face of serious breaches of international law. By contrast reparation, important though it is in many cases, may not be the central issue in a dispute between States as to questions of responsibility.[460]

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[457] Ibid., at p. 270, para. 114.

[458] For the concept of a continuing wrongful act, see commentary to article 14, paras. (3)-(11).

[459] The focus of the WTO Dispute Settlement Mechanism is on cessation rather than reparation: Agreement establishing the World Trade Organization, 15 April 1994, Annex 2, Understanding on Rules and Procedures governing the Settlement of Disputes, esp. art. 3 (7), which provides for compensation "only if the immediate withdrawal of the measure is impractical and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement". On the distinction between cessation and reparation for WTO purposes see e.g. *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, Panel Report, 21 January 2000 (WTO doc. WT/DS126/RW), para. 6.49.

[460] For cases where the International Court has recognized that this may be so see, e.g., *Fisheries Jurisdiction, Merits, (Federal Republic of Germany v. Iceland), I.C.J. Reports 1974*, p. 175, at pp. 201-205, paras. 65-76; *Gabčikovo-Nagymaros Project, I.C.J. Reports 1997*, p. 7, at p. 81, para. 153. See further C. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), pp. 77-92.

(5) The function of cessation is to put an end to a violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule. The responsible State's obligation of cessation thus protects both the interests of the injured State or States and the interests of the international community as a whole in the preservation of, and reliance on, the rule of law.

(6) There are several reasons for treating cessation as more than simply a function of the duty to comply with the primary obligation. First, the question of cessation only arises in the event of a breach. What must then occur depends not only on the interpretation of the primary obligation but also on the secondary rules relating to remedies, and it is appropriate that they are dealt with, at least in general terms, in Articles concerning the consequences of an internationally wrongful act. Secondly, continuing wrongful acts are a common feature of cases involving State responsibility and are specifically dealt with in article 14. There is a need to spell out the consequences of such acts in Part Two.

(7) The question of cessation often arises in close connection with that of reparation, and particularly restitution. The result of cessation may be indistinguishable from restitution, for example in cases involving the freeing of hostages or the return of objects or premises seized. Nonetheless the two must be distinguished. Unlike restitution, cessation is not subject to limitations relating to proportionality.[461] It may give rise to a continuing obligation, even when literal return to the *status quo ante* is excluded or can only be achieved in an approximate way.

(8) The difficulty of distinguishing between cessation and restitution is illustrated by the *Rainbow Warrior* arbitration. New Zealand sought the return of the two agents to detention on the island of Hao. According to New Zealand, France was obliged to return them to and to detain them on the island for the balance of the three years; that obligation had not expired since time spent off the island was not to be counted for that purpose. The Tribunal disagreed. In its view, the obligation was for a fixed term which had expired, and there was no question of cessation.[462] Evidently the return of the two agents to the island was of no use to New Zealand if there was no continuing obligation on the part of France to keep them there. Thus a return to the *status quo ante* may be of little or no value if the obligation breached no longer exists.

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[461] See article 35 (b) and commentary.

[462] *UNRIAA*, vol. XX, p. 217 (1990), at p. 266, para. 105.

Conversely, no option may exist for an injured State to renounce restitution if the continued performance of the obligation breached is incumbent upon the responsible State and the former State is not competent to release it from such performance. The distinction between cessation and restitution may have important consequences in terms of the obligations of the States concerned.

(9) Subparagraph (b) of article 30 deals with the obligation of the responsible State to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. Assurances and guarantees are concerned with the restoration of confidence in a continuing relationship, although they involve much more flexibility than cessation and are not required in all cases. They are most commonly sought when the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily. For example, following repeated demonstrations against the United States Embassy in Moscow in 1964-1965, President Johnson stated that ...

> "The U.S. Government must insist that its diplomatic establishments and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between States. Expressions of regret and compensation are no substitute for adequate protection."[463]

Such demands are not always expressed in terms of assurances or guarantees, but they share the characteristics of being future-looking and concerned with other potential breaches. They focus on prevention rather than reparation and they are included in article 30.

(10) The question whether the obligation to offer assurances or guarantees of non-repetition may be a legal consequence of an internationally wrongful act was debated in the *LaGrand* case.[464] This concerned an admitted failure of consular notification contrary to article 36 of the Vienna Convention on Consular Relations of 1963. In its fourth submission Germany sought both general and specific assurances and guarantees as to the means of future compliance with the Convention. The United States argued that to give such assurances or guarantees went beyond the scope of the obligations in the Convention and that the Court lacked jurisdiction to require them. In any event, formal assurances and guarantees were unprecedented and should

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[463] Reprinted in *I.L.M.*, vol. IV (1965), p. 698.

[464] *LaGrand (Germany v. United States of America), Merits*, judgment of 27 June 2001.

not be required. Germany's entitlement to a remedy did not extend beyond an apology, which the United States had given. Alternatively no assurances or guarantees were appropriate in light of the extensive action it had taken to ensure that federal and State officials would in future comply with the Convention. On the question of jurisdiction the Court held …

> "that a dispute regarding the appropriate remedies for the violation of the Convention alleged by Germany is a dispute that arises out of the interpretation or application of the Convention and thus is within the Court's jurisdiction. Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation. Consequently, the Court has jurisdiction in the present case with respect to the fourth submission of Germany."[465]

On the question of appropriateness, the Court noted that an apology would not be sufficient in any case in which a foreign national had been "subjected to prolonged detention or sentenced to severe penalties" following a failure of consular notification.[466] But in the light of information provided by the United States as to the steps taken to comply in future, the Court held …

> "that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), must be regarded as meeting Germany's request for a general assurance of non-repetition."[467]

As to the specific assurances sought by Germany, the Court limited itself to stating that …

> "… if the United States, notwithstanding its commitment referred to … should fail in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a

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[465] Ibid., para. 48, citing *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9,* p. 22.

[466] *LaGrand, Merits,* judgment of 27 June 2001, para. 123.

[467] Ibid., para. 124; see also the dispositif, para. 128 (6).

> conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention."[468]

The Court thus upheld its jurisdiction on Germany's fourth submission and responded to it in the dispositif. It did not, however, discuss the legal basis for assurances of non-repetition.

(11) Assurances or guarantees of non-repetition may be sought by way of satisfaction (e.g., the repeal of the legislation which allowed the breach to occur), and there is thus some overlap between the two in practice.[469] However they are better treated as an aspect of the continuation and repair of the legal relationship affected by the breach. Where assurances and guarantees of non-repetition are sought by an injured State, the question is essentially the reinforcement of a continuing legal relationship and the focus is on the future, not the past. In addition, assurances and guarantees of non-repetition may be sought by a State other than an injured State in accordance with article 48.

(12) Assurances are normally given verbally, while guarantees of non-repetition involve something more - for example, preventive measures to be taken by the responsible State designed to avoid repetition of the breach. With regard to the kind of guarantees that may be requested international practice is not uniform. The injured State usually demands either safeguards against the repetition of the wrongful act without any specification of the form they are to take[470] or, when the wrongful act affects its nationals, assurances of better protection of persons and property.[471] In the *LaGrand* case, the Court spelled out with some specificity the obligation that would arise for the United States from a future breach, but added that "[t]his obligation can be carried out in various ways. The choice of means must be left to the

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[468] Ibid., para. 125. See also ibid., para. 127, and the dispositif, para. 128 (7).

[469] See commentary to article 36, para. (5).

[470] In the "Dogger Bank" incident in 1904, the United Kingdom sought "security against the recurrence of such intolerable incidents": Martens, *Nouveau Recueil*, 2nd series, vol. XXXIII, p. 642. See also the exchange of notes between China and Indonesia following the attack in March 1966 against the Chinese Consulate General at Jakarta, in which the Chinese Deputy Minister for Foreign Affairs sought a guarantee that such incidents would not be repeated in the future: *R.G.D.I.P.*, vol. 70 (1966), p. 1013.

[471] Such assurances were given in the "Doane" incident (1886): Moore, *Digest*, vol. VI, pp. 345-346.

United States".[472] It noted further that a State may not be in a position to offer a firm guarantee of non-repetition.[473] Whether it could properly do so would depend on the nature of the obligation in question.

(13) In some cases, the injured State may ask the responsible State to adopt specific measures or to act in a specified way in order to avoid repetition. Sometimes the injured State merely seeks assurances from the responsible State that, in future, it will respect the rights of the injured State.[474] In other cases, the injured State requires specific instructions to be given,[475] or other specific conduct to be taken.[476] But assurances and guarantees of non-repetition will not always be appropriate, even if demanded. Much will depend on the circumstances of the case, including the nature of the obligation and of the breach. The rather exceptional character of the measures is indicated by the words "if the circumstances so require" at the end of subparagraph (b). The obligation of the responsible State with respect to assurances and guarantees of non-repetition is formulated in flexible terms in order to prevent the kinds of abusive or excessive claims which characterized some demands for assurances and guarantees by States in the past.

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[472] *LaGrand, Merits*, judgment of 27 June 2001, para. 125.

[473] Ibid., para. 124.

[474] See e.g. the 1901 case in which the Ottoman Empire gave a formal assurance that the British, Austrian and French postal services would henceforth operate freely in its territory: *R.G.D.I.P.*, vol. 8 (1901), p. 777, at pp. 788, 792.

[475] See e.g. the incidents involving *The "Herzog"* and *The "Bundesrath"*, two German ships seized by the British Navy in December 1899 and January 1900, during the Boer war, in which Germany drew the attention of Great Britain to "the necessity for issuing instructions to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war": Martens, *Nouveau Recueil*, 2nd series, vol. XXIX, pp. 456, 486.

[476] In the *Trail Smelter* case, the arbitral tribunal specified measures to be adopted by the Trail Smelter, including measures designed to "prevent future significant fumigations in the United States": *Trail Smelter (United States of America/Canada), UNRIAA*, vol. III, p. 1905 (1938, 1941), at p. 1934. Requests to modify or repeal legislation are frequently made by international bodies. See, e.g., the decisions of the Human Rights Committee: *Torres Ramirez v. Uruguay*, decision of 23 July 1980, para. 19, A/35/40, p. 126; *Lanza v. Uruguay*, decision of 3 April 1980, ibid. p. 111, at p. 119, para. 17; *Dermit Barbato v. Uruguay*, decision of 21 October 1982, A/38/40, p. 133, para. 11.

Article 31

Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Commentary

(1) The obligation to make full reparation is the second general obligation of the responsible State consequent upon the commission of an internationally wrongful act. The general principle of the consequences of the commission of an internationally wrongful act was stated by the Permanent Court in the *Factory at Chorzów* case:

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application."[477]

In this passage, which has been cited and applied on many occasions,[478] the Court was using the term "reparation" in its most general sense. It was rejecting a Polish argument that jurisdiction to interpret and apply a treaty did not entail jurisdiction to deal with disputes over the form and quantum of reparation to be made. By that stage of the dispute, Germany was no longer seeking for its national the return of the factory in question or of the property seized with it.

(2) In a subsequent phase of the same case, the Court went on to specify in more detail the content of the obligation of reparation. It said:

> "The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all

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[477] *Factory at Chorzów,* Jurisdiction, 1927, P.C.I.J., Series A, No. 9, p. 21.

[478] Cf. the International Court's reference to this decision in *LaGrand (Germany v. United States of America), Merits,* judgment of 27 June 2001, para. 48.

> probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."[479]

In the first sentence, the Court gave a general definition of reparation, emphasizing that its function was the re-establishment of the situation affected by the breach.[480] In the second sentence it dealt with that aspect of reparation encompassed by "compensation" for an unlawful act - that is, restitution or its value, and in addition damages for loss sustained as a result of the wrongful act.

(3) The obligation placed on the responsible State by article 31 is to make "full reparation" in the *Factory at Chorzów* sense. In other words, the responsible State must endeavour to "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"[481] through the provision of one or more of the forms of reparation set out in chapter II of this Part.

(4) The general obligation of reparation is formulated in article 31 as the immediate corollary of a State's responsibility, i.e., as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States. This formulation avoids the difficulties that might arise where the same obligation is owed simultaneously to several, many or all States, only a few of which are specially affected by in the breach. But quite apart from the questions raised when there is more than one State entitled to invoke responsibility,[482] the general obligation of reparation arises automatically upon commission of an internationally wrongful act and is not, as such, contingent upon a demand or protest by any State, even if the form which reparation should take in the circumstances may depend on the response of the injured State or States.

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[479] *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17*, p. 47.

[480] Cf. P-M. Dupuy, "Le fait générateur de la responsabilité internationale des États", *Recueil des cours*, vol. 188 (1984-V), p. 9, at p. 94, who uses the term "restauration".

[481] *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17*, p. 47.

[482] For the States entitled to invoke responsibility see articles 42 and 48 and commentaries. For the situation where there is a plurality of injured States see article 46 and commentary.

(5) The responsible State's obligation to make full reparation relates to the "injury caused by the internationally wrongful act". The notion of "injury", defined in paragraph 2, is to be understood as including any damage caused by that act. In particular, in accordance with paragraph 2, "injury" includes any material or moral damage caused thereby. This formulation is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, excluding merely abstract concerns or general interests of a State which is individually unaffected by the breach.[483] "Material" damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. "Moral" damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life. Questions of reparation for such forms of damage are dealt with in more detail in chapter II of this Part.[484]

(6) The question whether damage to a protected interest is a necessary element of an internationally wrongful act has already been discussed.[485] There is in general no such requirement; rather this is a matter which is determined by the relevant primary rule. In some cases, the gist of a wrong is the causing of actual harm to another State. In some cases what matters is the failure to take necessary precautions to prevent harm even if in the event no harm occurs. In some cases there is an outright commitment to perform a specified act, e.g. to incorporate uniform rules into internal law. In each case the primary obligation will determine what is required. Hence article 12 defines a breach of an international obligation as a failure to conform with an obligation.

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[483] Although not individually injured, such States may be entitled to invoke responsibility in respect of breaches of certain classes of obligation in the general interest, pursuant to article 48. Generally on notions of injury and damage see B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973); B. Graefrath, "Responsibility and damage caused: relations between responsibility and damages", *Recueil des cours*, vol. 185 (1984-II), p. 95; A. Tanzi, "Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?", in M. Spinedi & B. Simma (eds), United Nations *Codification of State Responsibility* (New York, Oceana, 1987) p. 1; I. Brownlie, *System of the Law of Nations: State Responsibility (Part I)* (Oxford, Clarendon Press, 1983), pp. 53-88.

[484] See especially article 36 and commentary.

[485] See commentary to article 2, para. (9).

(7) As a corollary there is no general requirement, over and above any requirements laid down by the relevant primary obligation, that a State should have suffered material harm or damage before it can seek reparation for a breach. The existence of actual damage will be highly relevant to the form and quantum of reparation. But there is no general requirement of material harm or damage for a State to be entitled to seek some form of reparation. In the *Rainbow Warrior* arbitration it was initially argued that "in the theory of international responsibility, damage is necessary to provide a basis for liability to make reparation", but the parties subsequently agreed that …

> "[u]nlawful action against non-material interests, such as acts affecting the honour, dignity or prestige of a State, entitle the victim State to receive adequate reparation, even if those acts have not resulted in a pecuniary or material loss for the claimant State."[486]

The Tribunal held that the breach by France had "provoked indignation and public outrage in New Zealand and caused a new, additional non-material damage… of a moral, political and legal nature, resulting from the affront to the dignity and prestige not only of New Zealand as such, but of its highest judicial and executive authorities as well".[487]

(8) Where two States have agreed to engage in particular conduct, the failure by one State to perform the obligation necessarily concerns the other. A promise has been broken and the right of the other State to performance correspondingly infringed. For the secondary rules of State responsibility to intervene at this stage and to prescribe that there is no responsibility because no identifiable harm or damage has occurred would be unwarranted. If the parties had wished to commit themselves to that formulation of the obligation they could have done so. In many cases the damage that may follow from a breach (e.g. harm to a fishery from fishing in the closed season, harm to the environment by emissions exceeding the prescribed limit, abstraction from a river of more than the permitted amount) may be distant, contingent or uncertain. Nonetheless States may enter into immediate and unconditional commitments in their mutual long-term interest in such fields. Accordingly article 31 defines "injury" in a broad and inclusive way, leaving it to the primary obligations to specify what is required in each case.

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[486] *Rainbow Warrior (New Zealand/France), UNRIAA*, vol. XX, p. 217 (1990), at p. 267, para. 109.

[487] Ibid., at p. 267, para. 110.

(9) Paragraph 2 addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury. It is only "[i]njury … caused by the internationally wrongful act of a State" for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.

(10) The allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses "attributable [to the wrongful act] as a proximate cause",[488] or to damage which is "too indirect, remote, and uncertain to be appraised",[489] or to "any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of" the wrongful act.[490] Thus causality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. In some cases, the criterion of "directness" may

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[488] See United States-Germany Mixed Claims Commission, *Administrative Decision No. II*, *UNRIAA*, vol. VII, p. 23 (1923), at p. 30. See also *Dix*, ibid, vol. IX, p. 119 (1902), at p. 121, and the Canadian statement of claim following the disintegration of the *Cosmos 954* Soviet nuclear-powered satellite over its territory in 1978: *I.L.M.*, vol. 18 (1979), p. 907, para. 23.

[489] See the *Trail Smelter* arbitration, *UNRIAA*, vol. III, p. 1905 (1938, 1941), at p. 1931. See also A. Hauriou, "Les dommages indirects dans les arbitrages internationaux", *R.G.D.I.P.*, vol. 31 (1924), p. 209 citing the *"Alabama"* arbitration as the most striking application of the rule excluding "indirect" damage.

[490] Security Council resolution 687 (1991), para. 16. This was a chapter VII resolution, but it is expressed to reflect Iraq's liability "under international law … as a result of its unlawful invasion and occupation of Kuwait". The United Nations Compensation Commission and the Governing Council have provided some guidance on the interpretation of the requirements of directness and causation under para. 16. See e.g. *Claims Against Iraq (Category "B" Claims)*, Report of 14 April 1994 (S/AC.26/1994/1), reproduced in *I.L.R.*, vol. 109, p. 127; approved by Governing Council Decision 20, 26 May 1994 (S/AC.26/Dec.20), reproduced in *I.L.R.*, vol. 109, p. 622; *Well Blowout Control Claim*, Report of 15 November 1996 (S/AC.26/1996/5), reproduced in *I.L.R.*, vol. 109, p. 480, at pp. 506-511, paras. 66-86; approved by Governing Council Decision 40, 17 December 1996 (S/AC.26/Dec.40), reproduced in *I.L.R.*, vol. 109, p. 669.

be used,[491] in others "foreseeability"[492] or "proximity".[493] But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule.[494] In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage "is not a part of the law which can be satisfactorily solved by search for a single verbal formula".[495] The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.

(11) A further element affecting the scope of reparation is the question of mitigation of damage. Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a "duty to mitigate", this is

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[491] As in Security Council resolution 687 (1991), para. 16.

[492] See, e.g., the *"Naulilaa"* case *(Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa) (Portugal v. Germany), UNRIAA*, vol. II, p. 1011 (1928), at p. 1031.

[493] For comparative reviews of issues of causation and remoteness see, e.g. H.L.A. Hart & A. M. Honoré, *Causation in the Law* (2nd ed.) (Oxford, Clarendon Press, 1985); A. M. Honoré, "Causation and Remoteness of Damage", A. Tunc, ed. In *International Encyclopedia of Comparative Law* vol. XI, Part 1, chap. VII, 156 p.; K. Zwiegert and H. Kötz, *Introduction to Comparative Law* (3rd ed) (trans. J.A. Weir) (Oxford, Clarendon Press, 1998), pp. 601-627 (esp. p. 609ff.); B. S. Markesinis, *The German Law of Obligations. Volume II. The Law of Torts: A Comparative Introduction* (Oxford, Clarendon Press, 3rd ed., 1997), pp. 95-108, with many references to the literature.

[494] See e.g. the decision of the Iran-United States Claims Tribunal in *Islamic Republic of Iran v. United States of America, Cases Nos. A15 (IV) and A24,* Award No. 590-A15 (IV)/A24-FT, 28 December 1998.

[495] P. S. Atiyah, *An Introduction to the Law of Contract* (5th ed.) (Oxford, Clarendon Press, 1995), p. 466.

not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent.[496] The point was clearly made in this sense by the International Court in the the *Gabčíkovo-Nagymaros Project* case:

> "Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that 'It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained.' It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act."[497]

(12) Often two separate factors combine to cause damage. In the *Diplomatic and Consular Staff* case,[498] the initial seizure of the hostages by militant students (not at that time acting as organs or agents of the State) was attributable to the combination of the students' own independent action and the failure of the Iranian authorities to take necessary steps to protect the embassy. In the *Corfu Channel* case,[499] the damage to the British ships was caused both by the action of a third State in laying the mines and the action of Albania in failing to warn of their presence. Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international

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[496] In the *Well Blowout Control Claim*, a Panel of the United Nations Compensation Commission noted that "under the general principles of international law relating to mitigation of damages … the Claimant was not only permitted but indeed obligated to take reasonable steps to … mitigate the loss, damage or injury being caused": Report of 15 November 1996 (S/AC.26/1994/5), reproduced in *I.L.R.*, vol. 109, p. 480, at pp. 502-503, para. 54.

[497] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, *I.C.J. Reports 1997*, p. 7, at p. 55, para. 80.

[498] *United States Diplomatic and Consular Staff in Tehran*, *I.C.J. Reports 1980*, p. 3, at pp. 29-32.

[499] *Corfu Channel, Merits*, *I.C.J. Reports 1949*, p. 4, at pp. 17-18, 22-23.

practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes,[500] except in cases of contributory fault.[501] In the *Corfu Channel* case, for example, the United Kingdom recovered the full amount of its claim against Albania based on the latter's wrongful failure to warn of the mines even though Albania had not itself laid the mines.[502] Such a result should follow a fortiori in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals, or some natural event such as a flood. In the *Diplomatic and Consular Staff* case the Islamic Republic of Iran was held to be fully responsible for the detention of the hostages from the moment of its failure to protect them.[503]

(13) It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful

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[500] This approach is consistent with the way in which these issues are generally dealt with in national law. "It is the very general rule that if a tortfeasor's behaviour is held to be a cause of the victim's harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause ... In other words, the liability of a tortfeasor is not affected vis-à-vis the victim by the consideration that another is concurrently liable": J.A. Weir, "Complex Liabilities", in A. Tunc, (ed.), *International Encyclopedia of Comparative Law (Tübingen, Mohr, 1983), vol. XI,* p. 41. The United States relied on this comparative law experience in its pleadings in the *Aerial Incident Cases (United States of America v. Bulgaria)* when it said, referring to articles 38 (1) (c) and (d) of the Statute, that "in all civilized countries the rule is substantially the same. An aggrieved plaintiff may sue any or all joint tortfeasors, jointly or severally, although he may collect from them, or any one or more of them, only the full amount of his damage". Memorial of 2 December 1958, in *I.C.J. Pleadings, Aerial Incident of 27 July 1955,* at p. 229.

[501] See article 39 and commentary.

[502] See *Corfu Channel* (*Assessment of the Amount of Compensation), I.C.J. Reports 1949,* p. 244, at p. 250.

[503] *I.C.J. Reports*, *1980,* p. 3 at pp. 31-33.

conduct. Indeed, in the *Zafiro* claim the tribunal went further and in effect placed the onus on the responsible State to show what proportion of the damage was *not* attributable to its conduct. It said:

> "We think it clear that not all of the damage was done by the Chinese crew of the *Zafiro*. The evidence indicates that an unascertainable part was done by Filipino insurgents, and makes it likely that some part was done by the Chinese employees of the company. But we do not consider that the burden is on Great Britain to prove exactly what items of damage are chargeable to the *Zafiro*. As the Chinese crew of the *Zafiro* are shown to have participated to a substantial extent and the part chargeable to unknown wrongdoers cannot be identified, we are constrained to hold the United States liable for the whole. In view, however, of our finding that a considerable, though unascertainable, part of the damage is not chargeable to the Chinese crew of the *Zafiro*, we hold that interest on the claims should not be allowed."[504]

(14) Concerns are sometimes expressed that a general principle of reparation of all loss flowing from a breach might lead to reparation which is out of all proportion to the gravity of the breach. However the notion of "proportionality" applies differently to the different forms of reparation.[505] It is addressed, as appropriate, in the individual articles in chapter II dealing with the forms of reparation.

Article 32

Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part.

Commentary

(1) Article 3 concerns the role of internal law in the characterization of an act as wrongful. Article 32 makes clear the irrelevance of a State's internal law to compliance with the obligations of cessation and reparation. It provides that a State which has committed an internationally wrongful act may not invoke its internal law as a justification for failure to comply with its obligations under this Part. Between them, articles 3 and 32 give effect for the

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[504] *"The Zafiro"*, *UNRIAA*, vol. VI, p. 160 (1925), at pp. 164-165.

[505] See articles 35 (b), 37 (3), 39 and commentaries thereto.

purposes of State responsibility to the general principle that a State may not rely on its internal law as a justification for its failure to comply with its international obligations.[506] Although practical difficulties may arise for a State organ confronted with an obstacle to compliance posed by the rules of the internal legal system under which it is bound to operate, the State is not entitled to oppose its internal law or practice as a legal barrier to the fulfilment of an international obligation arising under Part Two.

(2) Article 32 is modelled on article 27 of the 1969 Vienna Convention on the Law of Treaties,[507] which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This general principle is equally applicable to the international obligations deriving from the rules of State responsibility set out in Part Two. The principle may be qualified by the relevant primary rule, or by a *lex specialis*, such as article 41 of the European Convention on Human Rights, which provides for just satisfaction in lieu of full reparation "if the internal law of the said Party allows only partial reparation to be made".[508]

(3) The principle that a responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations arising out of the commission of an internationally wrongful act is supported both by State practice and international decisions. For example the dispute between Japan and the United States in 1906 over California's discriminatory education policies was resolved by the revision of the Californian legislation.[509] In the incident concerning article 61 (2) of the Weimar Constitution, a constitutional amendment was provided for in order to ensure the discharge of the obligation deriving from article 80 of the Treaty of Versailles.[510] In the *Peter Pázmány University* case the Permanent Court specified that

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[506] See commentary to article 3, paras. (2)-(4).

[507] Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

[508] United Nations, *Treaty Series*, vol. 213, p. 221, as renumbered by the Eleventh Protocol, 1994. Other examples include art. 32 of the Revised General Act for the Pacific Settlement of Disputes of 23 April 1949, United Nations, *Treaty Series*, vol. 72, p. 101, and art. 30 of the 1957 European Convention for the Peaceful Settlement of Disputes, United Nations, *Treaty Series*, vol. 320, p. 243.

[509] See R.L. Buell "The development of the anti-Japanese agitation in the United States", *Political Science Quarterly*, vol. 37 (1922), 620.

[510] *British and Foreign State Papers*, vol. 112, p. 1094.

the property to be returned should be "freed from any measure of transfer, compulsory administration, or sequestration".[511] In short, international law does not recognize that the obligations of a responsible State under Part Two are subject to the State's internal legal system nor does it allow internal law to count as an excuse for non-performance of the obligations of cessation and reparation.

Article 33

Scope of international obligations set out in this Part

> 1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
>
> 2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

Commentary

(1) Article 33 concludes the provisions of chapter I of Part Two by clarifying the scope and effect of the international obligations covered by the Part. In particular paragraph 1 makes it clear that identifying the State or States towards which the responsible State's obligations in Part Two exist depends both on the primary rule establishing the obligation that was breached and on the circumstances of the breach. For example, pollution of the sea, if it is massive and widespread, may affect the international community as a whole or the coastal States of a region; in other circumstances it might only affect a single neighbouring State. Evidently the gravity of the breach may also affect the scope of the obligations of cessation and reparation.

(2) In accordance with paragraph 1, the responsible State's obligations in a given case may exist towards another State, several States or the international community as a whole. The reference to several States includes the case in which a breach affects all the other parties to a treaty or to a legal regime established under customary international law. For instance, when an obligation can be defined as an "integral" obligation, the breach by a State necessarily affects all the other parties to the treaty.[512]

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[511] *Appeal from a judgement of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University), 1933, P.C.I.J., Series A/B, No. 61*, p. 208, at p. 249.

[512] See further article 42 (b) (ii) and commentary.

(3) When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights. Individual rights under international law may also arise outside the framework of human rights.[513] The range of possibilities is demonstrated from the judgment of the International Court in the *LaGrand* case,[514] where the Court held that article 36 of the Vienna Convention on Consular Relations "creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person".[515]

(4) Such possibilities underlie the need for paragraph 2 of article 33. Part Two deals with the secondary obligations of States in relation to cessation and reparation, and those obligations may be owed, *inter alia*, to one or several States or to the international community as a whole. In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. This is true, for example, under human rights treaties which provide a right of petition to a court or some other body for individuals affected. It is also true in the case of rights under bilateral or regional investment protection agreements. Part Three is concerned with the invocation of responsibility by other States, whether they are to be considered "injured States" under article 42, or other interested States under article 48, or whether they may be exercising specific rights to invoke responsibility under some special rule (cf. article 55). The Articles do not deal with the possibility of the invocation of responsibility by persons or entities other than States, and paragraph 2 makes this clear. It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than

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[513] Cf. *Jurisdiction of the Courts of Danzig, 1928, P.C.I.J., Series B, No. 15,* pp. 17-21.

[514] *LaGrand (Germany v. United States of America), Merits,* judgment of 27 June 2001.

[515] Ibid., para. 77. In the circumstances the Court did not find it necessary to decide whether the individual rights had "assumed the character of a human right": ibid., para. 78.

States are entitled to invoke responsibility on their own account. Paragraph 2 merely recognizes the possibility: hence the phrase "which may accrue directly to any person or entity other than a State".

Chapter II

Reparation for injury

Chapter II deals with the forms of reparation for injury, spelling out in further detail the general principle stated in article 31, and in particular seeking to establish more clearly the relations between the different forms of reparation, viz., restitution, compensation and satisfaction, as well as the role of interest and the question of taking into account any contribution to the injury which may have been made by the victim.

Article 34

Forms of reparation

> **Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.**

Commentary

(1) Article 34 introduces chapter II by setting out the forms of reparation which separately or in combination will discharge the obligation to make full reparation for the injury caused by the internationally wrongful act. Since the notion of "injury" and the necessary causal link between the wrongful act and the injury are defined in the statement of the general obligation to make full reparation in article 31,[516] article 34 need do no more than refer to "[f]ull reparation for the injury caused".

(2) In the *Factory at Chorzów* case, the injury was a material one and the Permanent Court dealt only with two forms of reparation, restitution and compensation.[517] In certain cases, satisfaction may be called for as an additional form of reparation. Thus full reparation may take the form of restitution, compensation and satisfaction, as required by the circumstances. Article 34 also makes it clear that full reparation may only be achieved in particular cases by the combination of different forms of reparation. For example, re-establishment of the situation

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[516] See commentary to article 31, paras. (4)-(14).

[517] *Factory at Chorzów, Merits, 1928, P.C.I.J. Series A, No. 17*, p. 47.

which existed before the breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (e.g., injury flowing from the loss of the use of property wrongfully seized). Wiping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused.

(3) The primary obligation breached may also play an important role with respect to the form and extent of reparation. In particular, in cases of restitution not involving the return of persons, property or territory of the injured State, the notion of reverting to the *status quo ante* has to be applied having regard to the respective rights and competences of the States concerned. This may be the case, for example, where what is involved is a procedural obligation conditioning the exercise of the substantive powers of a State. Restitution in such cases should not give the injured State more than it would have been entitled to if the obligation had been performed.[518]

(4) The provision of each of the forms of reparation described in article 34 is subject to the conditions laid down in the articles which follow it in chapter II. This limitation is indicated by the phrase "in accordance with the provisions of this chapter". It may also be affected by any valid election that may be made by the injured State as between different forms of reparation. For example, in most circumstances the injured State is entitled to elect to receive compensation rather than restitution. This element of choice is reflected in article 43.

(5) Concerns have sometimes been expressed that the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible State is concerned. The issue is whether the principle of proportionality should be articulated as an aspect of the obligation to make full reparation. In these Articles, proportionality is addressed in the context of each form of reparation, taking into account its specific character. Thus restitution is excluded if it would involve a burden out of all proportion to the benefit gained by the injured State or other party.[519] Compensation is limited to damage actually suffered as a result of the

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[518] Thus in the *LaGrand* case, the Court indicated that a breach of the notification requirement in art. 36 of the Vienna Convention on Consular Relations, United Nations, *Treaty Series*, vol. 596, p. 261, leading to a severe penalty or prolonged detention, would require reconsideration of the fairness of the conviction "by taking account of the violation of the rights set forth in the Convention": *LaGrand (Germany v. United States of America), Merits,* judgment of 27 June 2001, para. 125. This would be a form of restitution which took into account the limited character of the rights in issue.

[519] See article 35 (b) and commentary.

internationally wrongful act, and excludes damage which is indirect or remote.[520] Satisfaction must "not be out of proportion to the injury".[521] Thus each of the forms of reparation takes such considerations into account.

(6) The forms of reparation dealt with in chapter II represent ways of giving effect to the underlying obligation of reparation set out in article 31. There are not, as it were, separate secondary obligations of restitution, compensation and satisfaction. Some flexibility is shown in practice in terms of the appropriateness of requiring one form of reparation rather than another, subject to the requirement of full reparation for the breach in accordance with article 31.[522] To the extent that one form of reparation is dispensed with or is unavailable in the circumstances, others, especially compensation, will be correspondingly more important.

Article 35

Restitution

> A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:
>
> (*a*) Is not materially impossible;
>
> (*b*) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Commentary

(1) In accordance with article 34, restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act. Restitution involves the re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act, to the extent that any changes that have occurred in that situation may be traced to

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[520] See article 31 and commentary.

[521] See article 37 (3) and commentary.

[522] E.g., *Mélanie Lachenal*, *UNRIAA*, vol. XIII, p. 116 (1954), at pp. 130-131, where compensation was accepted in lieu of restitution originally decided upon, the Franco-Italian Conciliation Commission having agreed that restitution would require difficult internal procedures. See also commentary to article 35, para. (4).

that act. In its simplest form, this involves such conduct as the release of persons wrongly detained or the return of property wrongly seized. In other cases, restitution may be a more complex act.

(2) The concept of restitution is not uniformly defined. According to one definition, restitution consists in re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act. Under another definition, restitution is the establishment or re-establishment of the situation that would have existed if the wrongful act had not been committed. The former definition is the narrower one; it does not extend to the compensation which may be due to the injured party for loss suffered, for example for loss of the use of goods wrongfully detained but subsequently returned. The latter definition absorbs into the concept of restitution other elements of full reparation and tends to conflate restitution as a form of reparation and the underlying obligation of reparation itself. Article 35 adopts the narrower definition which has the advantage of focusing on the assessment of a factual situation and of not requiring a hypothetical inquiry into what the situation would have been if the wrongful act had not been committed. Restitution in this narrow sense may of course have to be completed by compensation in order to ensure full reparation for the damage caused, as article 36 makes clear.

(3) Nonetheless, because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by the Permanent Court in the *Factory at Chorzów* case when it said that the responsible State was under "the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible".[523] The Court went on to add that "[t]he impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution".[524] It can be seen in

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[523] *Factory at Chorzów, Merits, 1928, P.C.I.J. Series A, No. 17*, p. 48.

[524] Ibid.

operation in the cases where tribunals have considered compensation only after concluding that, for one reason or another, restitution could not be effected.[525] Despite the difficulties restitution may encounter in practice, States have often insisted upon claiming it in preference to compensation. Indeed in certain cases, especially those involving the application of peremptory norms, restitution may be required as an aspect of compliance with the primary obligation.

(4) On the other hand there are often situations where restitution is not available or where its value to the injured State is so reduced that other forms of reparation take priority. Questions of election as between different forms of reparation are dealt with in the context of Part Three.[526] But quite apart from valid election by the injured State or other entity, the possibility of restitution may be practically excluded, e.g. because the property in question has been destroyed or fundamentally changed in character or the situation cannot be restored to the *status quo ante* for some reason. Indeed in some cases tribunals have inferred from the terms of the *compromis* or the positions of the parties what amounts to a discretion to award compensation rather than restitution. For example, in the *Walter Fletcher Smith* case, the arbitrator, while maintaining that restitution should be appropriate in principle, interpreted the *compromis* as giving him a discretion to award compensation and did so in "the best interests of the parties, and of the public".[527] In the *Aminoil* arbitration, the parties agreed that restoration of the *status quo ante* following the annulment of the concession by the Kuwaiti decree would be impracticable.[528]

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[525] See, e.g., *British Claims in the Spanish Zone of Morocco*, *UNRIAA*, vol. II, p. 615 (1925), at pp. 621-625, 651-742; *Religious Property Expropriated by Portugal*, ibid., vol. I, p. 7 (1920); *Walter Fletcher Smith*, ibid., vol. II, p. 913 (1927), at p. 918; *Heirs of Lebas de Courmont*, ibid., vol. XIII, p. 761 (1957), at p. 764.

[526] See articles 43, 45 and commentaries.

[527] *UNRIAA*, vol. II, p. 915 (1929), at p. 918. In the *Greek Telephone Company* case, the arbitral tribunal, while ordering restitution, asserted that the responsible State could provide compensation instead for "important State reasons". See J.G. Welter and S.M. Schwebel, "Some little known cases on concessions", *B.Y.I.L.*, vol. 40 (1964), p. 216, at p. 221.

[528] *Government of Kuwait v. American Independent Oil Company,* (1982) *I.L.R.*, vol. 66, p. 529, at p. 533.

(5) Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them. Examples of material restitution include the release of detained individuals, the handing over to a State of an individual arrested in its territory,[529] the restitution of ships,[530] or other types of property[531] including documents, works of art, share certificates, etc.[532] The term "juridical restitution" is sometimes used where restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law,[533] the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner[534] or a requirement that steps be taken (to the extent allowed by international law) for the termination of a treaty.[535] In some cases, both material and juridical restitution may be

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[529] Examples of material restitution involving persons include the "*Trent*" (1861) and "*Florida*" (1864) incidents, both involving the arrest of individuals on board ships: Moore, *Digest*, vol. VII, pp. 768, 1090-1091), and the *Diplomatic and Consular Staff* case in which the International Court ordered Iran to immediately release every detained United States national: *Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at pp. 44-45.

[530] See e.g. the "*Giaffarieh*" incident (1886) which originated in the capture in the Red Sea by an Egyptian warship of four merchant ships from Massawa under Italian registry: Società Italiana per l'Organizzazione Internazionale, Consiglio Nazionale delle Ricerche, *La prassi italiana di diritto internazionale*, 1st series (Dobbs Ferry, Oceana, 1970), vol. II, pp. 901-902.

[531] E.g., *Temple of Preah Vihear, Merits, I.C.J. Reports* 1962, p. 6, at pp. 36-37, where the International Court decided in favour of a Cambodian claim which included restitution of certain objects removed from the area and the temple by Thai authorities. See also the *Hôtel Métropole* case, *UNRIAA*, vol. XIII, p. 219 (1950), the *Ottoz* case, ibid., vol. XIII, p. 240 (1950), the *Hénon* case , ibid., vol. XIII, p. 249 (1951).

[532] In the *Buzau-Nehoiasi Railway* case, an arbitral tribunal provided for the restitution to a German company of shares in a Romanian railway company: *UNRIAA*, vol. III, p. 1839 (1939).

[533] For cases where the existence of a law itself amounts to a breach of an international obligation see commentary to article 12, para. (12).

[534] E.g., the *Martini* case, *UNRIAA*, vol. II, p. 973 (1930).

[535] In the *Bryan-Chamorro Treaty* case (*Costa Rica v. Nicaragua*), the Central American Court of Justice decided that "the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to re-establish and maintain the

involved.[536] In others, an international court or tribunal can, by determining the legal position with binding force for the parties, award what amounts to restitution under another form.[537] The term "restitution" in article 35 thus has a broad meaning, encompassing any action that needs to be taken by the responsible State to restore the situation resulting from its internationally wrongful act.

(6) What may be required in terms of restitution will often depend on the content of the primary obligation which has been breached. Restitution, as the first of the forms of reparation, is of particular importance where the obligation breached is of a continuing character, and even more so where it arises under a peremptory norm of general international law. In the case, for example, of unlawful annexation of a State, the withdrawal of the occupying State's forces and the annulment of any decree of annexation may be seen as involving cessation rather than restitution.[538] Even so, ancillary measures (the return of persons or property seized in the course of the invasion) will be required as an aspect either of cessation or restitution.

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legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics in so far as relates to matters considered in this action..." *A.J.I.L.*, vol. 11 (1917), p. 674, at p. 696; See also p. 683.

[536] Thus the Permanent Court held that Czechoslovakia was "bound to restore to the Royal Hungarian Peter Pázmány University of Budapest the immovable property claimed by it, freed from any measure of transfer, compulsory administration, or sequestration, and in the condition in which it was before the application of the measures in question": *Appeal from a judgement of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University), 1933, P.C.I.J., Series A/B, No. 61,* p. 208, at p. 249.

[537] In the *Legal Status of Eastern Greenland* case, the Permanent Court decided "that the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid.": *1933, P.C.I.J., Series A/B, No. 53,* p. 22, at p. 75. In *Free Zones of Upper Savoy and the District of Gex* the Permanent Court decided that France "must withdraw its customs line in accordance with the provisions of the said treaties and instruments; and that this regime must continue in force so long as it has not been modified by agreement between the Parties": *1932, P.C.I.J., Series A/B, No. 46,* p. 96, at p.172. See also F.A. Mann, "The consequences of an international wrong in international and municipal law", *B.Y.I.L.*, vol. 48 (1976-77), p. 1 at pp. 5-8.

[538] See above, commentary to article 30, para. (8).

(7) The obligation to make restitution is not unlimited. In particular, under article 35 restitution is required "provided and to the extent that" it is neither materially impossible nor wholly disproportionate. The phrase "provided and to the extent that" makes it clear that restitution may be only partially excluded, in which case the responsible State will be obliged to make restitution to the extent that this is neither impossible nor disproportionate.

(8) Under article 35 (a), restitution is not required if it is "materially impossible". This would apply where property to be restored has been permanently lost or destroyed, or has deteriorated to such an extent as to be valueless. On the other hand, restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these. Under article 32 the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation, and the mere fact of political or administrative obstacles to restitution do not amount to impossibility.

(9) Material impossibility is not limited to cases where the object in question has been destroyed, but can cover more complex situations. In the *Forests of Central Rhodope* case, the claimant was entitled to only a share in the forestry operations and no claims had been brought by the other participants. The forests were not in the same condition as at the time of their wrongful taking, and detailed inquiries would be necessary to determine their condition. Since the taking, third parties had acquired rights to them. For a combination of these reasons, restitution was denied.[539] The case supports a broad understanding of the impossibility of granting restitution, but it concerned questions of property rights within the legal system of the responsible State.[540] The position may be different where the rights and obligations in issue arise directly on the international plane. In that context restitution plays a particularly important role.

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[539] *UNRIAA*, vol. III, p. 1405 (1933), at p. 1432.

[540] For questions of restitution in the context of State contract arbitration see *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Government of the Libyan Arab Republic*, (1977) *I.L.R.*, vol. 53, p. 389, at pp. 507-8, para. 109; *BP Exploration Company (Libya) Ltd. v. Government of the Libyan Arab Republic*, (1974) *I.L.R.*, vol. 53, p. 297, at p. 354; *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, (1977) *I.L.R.*, vol. 62, p. 140, at p. 200.

(10) In certain cases, the position of third parties may have to be taken into account in considering whether restitution is materially possible. This was true in the *Forests of Central Rhodope* case.[541] But whether the position of a third party will preclude restitution will depend on the circumstances, including whether the third party at the time of entering into the transaction or assuming the disputed rights was acting in good faith and without notice of the claim to restitution.

(11) A second exception, dealt with in article 35 (b), involves those cases where the benefit to be gained from restitution is wholly disproportionate to its cost to the responsible State. Specifically, restitution may not be required if it would "involve a burden out of all proportion to the benefit deriving from restitution instead of compensation". This applies only where there is a grave disproportionality between the burden which restitution would impose on the responsible State and the benefit which would be gained, either by the injured State or by any victim of the breach. It is thus based on considerations of equity and reasonableness,[542] although with a preference for the position of the injured State in any case where the balancing process does not indicate a clear preference for compensation as compared with restitution. The balance will invariably favour the injured State in any case where the failure to provide restitution would jeopardize its political independence or economic stability.

Article 36

Compensation

> 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
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> 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

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[541] *UNRIAA*, vol. III, p. 1405 (1933), at p. 1432.

[542] See, e.g., J.H.W. Verzijl, *International Law in Historical Perspective* (Leyden, Sijthoff, 1973), part VI, p. 744, and the position taken by the Deutsche Gesellschaft für Völkerrecht, in *Yearbook ... 1969*, vol. II, p. 155.

Commentary

(1) Article 36 deals with compensation for damage caused by an internationally wrongful act, to the extent that such damage is not made good by restitution. The notion of "damage" is defined inclusively in article 31 (2) as any damage whether material or moral.[543] Article 36 (2) develops this definition by specifying that compensation shall cover any financially assessable damage including loss of profits so far as this is established in the given case. The qualification "financially assessable" is intended to exclude compensation for what is sometimes referred to as "moral damage" to a State, i.e., the affront or injury caused by a violation of rights not associated with actual damage to property or persons: this is the subject matter of satisfaction, dealt with in article 37.

(2) Of the various forms of reparation, compensation is perhaps the most commonly sought in international practice. In the *Gabčíkovo-Nagymaros Project* case, the Court declared: "[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it".[544] It is equally well-established that an international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered.[545]

(3) The relationship with restitution is clarified by the final phrase of article 36 ("insofar as such damage is not made good by restitution"). Restitution, despite its primacy as a matter of legal principle, is frequently unavailable or inadequate. It may be partially or entirely ruled out either on the basis of the exceptions expressed in article 35, or because the injured State prefers

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[543] See commentary to article 31, paras. (5), (6), (8).

[544] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997,* p. 7, at p. 81, para. 152. See also the statement by the Permanent Court of International Justice in the *Factory at Chorzów* case, declaring that it is "a principle of international law that the reparation of a wrong may consist in an indemnity": *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17,* p. 27.

[545] *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9,* p. 21; *Fisheries Jurisdiction,(Federal Republic of Germany v. Iceland), Merits, I.C.J. Reports 1974,* p. 175, at pp. 203-205, paras. 71-76; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, I.C.J. Reports 1986*, p. 14, at p. 142.

compensation or for other reasons. Even where restitution is made, it may be insufficient to ensure full reparation. The role of compensation is to fill in any gaps so as to ensure full reparation for damage suffered.[546] As the Umpire said in the "*Lusitania*" case:

> "The fundamental concept of 'damages' is ... reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole."[547]

Likewise the role of compensation was articulated by the Permanent Court in the following terms:

> "Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."[548]

Entitlement to compensation for such losses is supported by extensive case law, State practice and the writings of jurists.

(4) As compared with satisfaction, the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. In other words, the function of article 36 is purely compensatory, as its title indicates. Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary

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[546] *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17*, pp. 47-8.

[547] *UNRIAA*, vol. VII, p. 32 (1923), at p. 39 (emphasis in original).

[548] *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17*, p. 47, cited and applied *inter alia* by the International Tribunal for the Law of the Sea in *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, judgment of 1 July 1999, para. 170. See also *Papamichalopoulos v. Greece (Art. 50), E.C.H.R., Series A, No. 330-B* (1995), at para. 36 (European Court of Human Rights); *Velásquez Rodríguez, Inter-Am.Ct.H.R., Series C, No. 4* (1989), at pp. 26-27, 30-31 (Inter-American Court of Human Rights); *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran and Others*, (1984) 6 *Iran-U.S.C.T.R.* 219, at p. 225.

character.[549] Thus compensation generally consists of a monetary payment, though it may sometimes take the form, as agreed, of other forms of value. It is true that monetary payments may be called for by way of satisfaction under article 37, but they perform a function distinct from that of compensation. Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured State as a result of the breach. Satisfaction is concerned with non-material injury, specifically non-material injury to the State, on which a monetary value can be put only in a highly approximate and notional way.[550]

(5) Consistently with other provisions of Part Two, article 36 is expressed as an obligation of the responsible State to provide reparation for the consequences flowing from the commission of an internationally wrongful act.[551] The scope of this obligation is delimited by the phrase "any financially assessable damage", that is, any damage which is capable of being evaluated in financial terms. Financially assessable damage encompasses both damage suffered by the State itself (to its property or personnel or in respect of expenditures reasonably incurred to remedy or mitigate damage flowing from an internationally wrongful act) as well as damage suffered by nationals, whether persons or companies, on whose behalf the State is claiming within the framework of diplomatic protection.

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[549] In *Velásquez Rodriguez (Compensation)*, the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages: *Inter-Am. Ct.H.R., Series C, No. 7* (1989), p. 52. See also *Re Letelier and Moffit*, (1992) *I.L.R.*, vol. 88, p. 727 concerning the assassination in Washington by Chilean agents of a former Chilean Minister; the *compromis* excluded any award of punitive damages, despite their availability under United States law. On punitive damages see also N. Jørgensen, "A Reappraisal of Punitive Damages in International Law", *B.Y.I.L.*, vol. 68 (1997), p. 247; S. Wittich, "Awe of the Gods and Fear of the Priests: Punitive Damages in the Law of State Responsibility", *Austrian Review of International and European Law*, vol. 3 (1998), p. 31.

[550] See commentary to article 37, para. (3).

[551] For the requirement of a sufficient causal link between the internationally wrongful act and the damage see commentary to article 31, paras. (11)-(13).

(6) In addition to the International Court of Justice, international tribunals dealing with issues of compensation include the International Tribunal for the Law of the Sea,[552] the Iran-United States Claims Tribunal,[553] human rights courts and other bodies,[554] and I.C.S.I.D. tribunals under the Washington Convention of 1965.[555] Other compensation claims have been settled by agreement, normally on a without prejudice basis, with the payment of substantial compensation a term of the agreement.[556] The rules and principles developed by these bodies in assessing compensation can be seen as manifestations of the general principle stated in article 36.

(7) As to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon the content of particular primary obligations, an evaluation of the respective behaviour of the parties and, more generally, a

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[552] E.g., *The M/V "Saiga" (No.2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, judgment of 1 July 1999, paras. 170-177.

[553] The Iran-United States Claims Tribunal has developed a substantial jurisprudence on questions of assessment of damage and the valuation of expropriated property. For reviews of the Tribunal's jurisprudence on these subjects see *inter alia*, G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), chs. 5, 6, 12; C.N. Brower and J.D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague, Nijhoff, 1998), chs. 14-18; M. Pellonpää, "Compensable Claims Before the Tribunal: Expropriation Claims", in R.B. Lillich & D.B. McGraw (eds.), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Irvington-on-Hudson, Transnational Publishers, 1998), pp. 185-266; D.P. Stewart, "Compensation and Valuation Issues", ibid., pp. 325-385.

[554] For a review of the practice of such bodies in awarding compensation see D. Shelton, *Remedies in International Human Rights Law* (Oxford, Oxford University Press, 1999), pp. 214-279.

[555] I.C.S.I.D. Tribunals have jurisdiction to award damages or other remedies in cases concerning investments arising between States parties and nationals. Some of these claims involve direct recourse to international law as a basis of claim. See e.g. *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, (1990) 4 *I.C.S.I.D. Reports* 245.

[556] See e.g. *Certain Phosphate Lands in Nauru*, *I.C.J. Reports 1992* p. 240, and for the Court's order of discontinuance following the settlement, *I.C.J. Reports 1993*, p. 322; *Passage through the Great Belt (Finland v. Denmark)*, *I.C.J. Reports 1992*, p. 348 (order of discontinuance following settlement); *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, *I.C.J. Reports 1996*, p. 9 (order of discontinuance following settlement).

concern to reach an equitable and acceptable outcome.[557] The following examples illustrate the types of damage that may be compensable and the methods of quantification that may be employed.

(8) Damage to the State as such might arise out of the shooting down of its aircraft or the sinking of its ships, attacks on its diplomatic premises and personnel, damage caused to other public property, the costs incurred in responding to pollution damage, or incidental damage arising, for example, out of the need to pay pensions and medical expenses for officials injured as the result of a wrongful act. Such a list cannot be comprehensive and the categories of compensable injuries suffered by States are not closed.

(9) In the *Corfu Channel* case, the United Kingdom sought compensation in respect of three heads of damage: replacement of the destroyer *Saumarez*, which became a total loss, the damage sustained by the destroyer *Volage*, and the damage resulting from the deaths and injuries of naval personnel. The Court entrusted the assessment to expert enquiry. In respect of the destroyer *Saumarez* the Court found that "the true measure of compensation" was "the replacement cost of the [destroyer] at the time of its loss" and held that the amount of compensation claimed by the United Kingdom Government (£700,087) was justified. For the damage to the destroyer *Volage*, the experts had reached a slightly lower figure than the £93,812 claimed by the United Kingdom, "explained by the necessarily approximate nature of the valuation, especially as regards stores and equipment". In addition to the amounts awarded for the damage to the two destroyers, the Court upheld the United Kingdom's claim for £50,048 representing "the cost of pensions and other grants made by it to victims or their dependants, and for costs of administration, medical treatment, etc."[558]

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[557] Cf. G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996), p. 242. See also B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages", *Recueil des cours*, vol. 185 (1984-II), p. 95 at p. 101; L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, Sirey, 1938); C.D. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), pp. 33-34; J. Personnaz, *La réparation du préjudice en droit international public* (Paris, 1939); M. Iovane, *La riparazione nella teoria e nella prassi dell'illecito internazionale* (Giuffré, Milan, 1990).

[558] *Corfu Channel case (Assessment of Compensation), I.C.J. Reports* 1949 p. 244, at p. 249.

(10) In the *M/V "Saiga"* case, Saint Vincent and the Grenadines sought compensation from Guinea following the wrongful arrest and detention of a Saint Vincent and the Grenadines' registered vessel, the *Saiga*, and its crew. The International Tribunal for the Law of the Sea awarded compensation of US$ 2,123,357 with interest. The heads of damage compensated included, *inter alia*, damage to the vessel, including costs of repair, losses suffered with respect to charter hire of the vessel, costs related to the detention of the vessel, and damages for the detention of the captain, members of the crew and others on board the vessel. Saint Vincent and the Grenadines had claimed compensation for the violation of its rights in respect of ships flying its flag occasioned by the arrest and detention of the *Saiga*, however, the Tribunal considered that its declaration that Guinea acted wrongfully in arresting the vessel in the circumstances, and in using excessive force, constituted adequate reparation.[559] Claims regarding the loss of registration revenue due to the illegal arrest of the vessel and for the expenses resulting from the time lost by officials in dealing with the arrest and detention of the ship and its crew were also unsuccessful. In respect of the former, the Tribunal held that Saint Vincent and the Grenadines failed to produce supporting evidence. In respect of the latter, the Tribunal considered that such expenses were not recoverable since they were incurred in the exercise of the normal functions of a flag State.[560]

(11) In a number of cases payments have been directly negotiated between injured and injuring States following wrongful attacks on ships causing damage or sinking of the vessel, and in some cases, loss of life and injury among the crew.[561] Similar payments have been negotiated

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[559] *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, judgment of 1 July 1999, para. 176.

[560] Ibid., para. 177.

[561] See the payment by Cuba to the Bahamas for the sinking by Cuban aircraft on the high seas of a Bahamian vessel, with loss of life among the crew (*R.G.D.I.P.*, vol. 85 (1981), p. 540), the payment of compensation by Israel for an attack in 1967 on the *U.S.S. Liberty*, with loss of life and injury among the crew (*R.G.D.I.P*, vol. 85 (1981), p. 562) and the payment by Iraq of US$ 27 million for the 37 deaths which occurred in May 1987 when Iraqi aircraft severely damaged the *U.S.S. Stark* (*A.J.I.L.*, vol. 83 (1989), p. 561).

where damage is caused to aircraft of a State, such as the "full and final settlement" agreed between Iran and the United States following a dispute over the destruction of an Iranian aircraft and the killing of its 290 passengers and crew.[562]

(12) Agreements for the payment of compensation are also frequently negotiated by States following attacks on diplomatic premises, whether in relation to damage to the embassy itself[563] or injury to its personnel.[564] Damage caused to other public property, such as roads and infrastructure, has also been the subject of compensation claims.[565] In many cases these payments have been made on an ex gratia or without prejudice basis, without any admission of responsibility.[566]

(13) Another situation in which States may seek compensation for damage suffered by the State as such is where costs are incurred in responding to pollution damage. Following the crash of the Soviet Cosmos-954 satellite on Canadian territory in January 1978, Canada's claim for compensation for expenses incurred in locating, recovering, removing and testing radioactive debris and cleaning up affected areas was based "jointly and separately on (a) the relevant

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[562] *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America), I.C.J. Reports* 1996, p. 9 (order of discontinuance following settlement). For the settlement agreement itself, see the General Agreement between Iran and the United States on the Settlement of Certain I.C.J. and Tribunal Cases of 9 February 1996, made an Award on Agreed Terms by order of the Iran-United States Claims Tribunal, 22 February 1996: (1996) 32 *Iran-U.S.C.T.R.* 207, at p. 213.

[563] See e.g. the Agreement of 1 December 1966 between the United Kingdom and Indonesia for the payment by the latter of compensation for, *inter alia*, damage to the British Embassy during mob violence (*United Kingdom Treaty Series*, No. 34 (1967)) and the payment by Pakistan to the United States of compensation for the sacking of the United States' Embassy in Islamabad in 1979: *R.G.D.I.P.*, vol. 85 (1981), p. 880.

[564] See e.g. Claim of Consul *Henry R. Myers* (*United States v. San Salvador*), [1890] *U.S. For. Rels.* pp. 64-65; [1892] *U.S. For. Rels.* pp. 24-43, 44, 49-51; [1893] *U.S. For. Rels.* pp. 174-179, 181-182, 184); Whiteman, *Damages*, vol. I, pp. 80-81.

[565] For examples see Whiteman, *Damages*, vol. I, p. 81.

[566] See e.g. United States-China agreement providing for an ex gratia payment of US$ 4.5 million, to be given to the families of those killed and to those injured in the bombing of the Chinese Embassy in Belgrade on 7 May 1999, *A.J.I.L.*, vol. 94 (2000), p. 127.

international agreements… and (b) general principles of international law".[567] Canada asserted that it was applying "the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty".[568] The claim was eventually settled in April 1981 when the parties agreed on an ex gratia payment of Can. $3 million (about 50 per cent of the amount claimed).[569]

(14) Compensation claims for pollution costs have been dealt with by the United Nations Compensation Commission in the context of assessing Iraq's liability under international law "for any direct loss, damage - including environmental damage and the depletion of natural resources … as a result of its unlawful invasion and occupation of Kuwait".[570] Decision 7 of the Governing Council of the Commission specifies various heads of damage encompassed by "environmental damage and the depletion of natural resources".[571]

(15) In cases where compensation has been awarded or agreed following an internationally wrongful act that causes or threatens environmental damage, payments have been directed to reimbursing the injured State for expenses reasonably incurred in preventing or remedying pollution, or to providing compensation for a reduction in the value of polluted property.[572]

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[567] Canada, Claim against the USSR for Damage Caused by Soviet Cosmos 954, 23 January 1979, *I.L.M.* vol. 18 (1979), p. 899, at p. 905.

[568] Ibid., at p. 906.

[569] Protocol between Canada and the USSR, 2 April 1981, *I.L.M.*, vol. 20 (1981), 689.

[570] S.C. Res. 687 (1991), para. 16.

[571] Decision 7 of 17 March 1992, *Criteria for Additional Categories of Claims*, S/AC.26/1991/7/Rev.1.

[572] See the decision of the arbitral tribunal in the *Trail Smelter Arbitration, UNRIAA*, vol. III, p. 1907 (1938, 1941), which provided compensation to the United States for damage to land and property caused by sulphur dioxide emissions from a smelter across the border in Canada. Compensation was assessed on the basis of the reduction in value of the affected land.

However, environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation. Damage to such environmental values (biodiversity, amenity, etc - sometimes referred to as "non-use values") is, as a matter of principle, no less real and compensable than damage to property, though it may be difficult to quantify.

(16) Within the field of diplomatic protection, a good deal of guidance is available as to appropriate compensation standards and methods of valuation, especially as concerns personal injury and takings of, or damage to, tangible property. It is well-established that a State may seek compensation in respect of personal injuries suffered by its officials or nationals, over and above any direct injury it may itself have suffered in relation to the same event. Compensable personal injury encompasses not only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage suffered by the individual (sometimes, though not universally, referred to as "moral damage" in national legal systems). Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life. No less than material injury sustained by the injured State, non-material damage is financially assessable and may be the subject of a claim of compensation, as stressed in the *"Lusitania"* case.[573] The Umpire considered that international law provides compensation for mental suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to credit and reputation, such injuries being "very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated ..."[574]

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[573] *UNRIAA*, vol. VII, p. 32 (1923). International tribunals have frequently granted pecuniary compensation for moral injury to private parties. E.g. *Chevreau (France v. United Kingdom),* ibid., vol. II, p. 1113 (1923); *A.J.I.L.*, vol. 27, 1933, p. 153; *Gage, UNRIAA*, vol. X, p. 226 (1903); *Di Caro*, ibid., vol. X, p. 597 (1903); *Heirs of Jean Maninat*, ibid., vol. X, p. 55 (1903).

[574] *UNRIAA*, vol. VII, p. 32 (1923), at p. 40.

(17) International courts and tribunals have undertaken the assessment of compensation for personal injury on numerous occasions. For example, in the *M/V "Saiga"* case,[575] the Tribunal held that Saint Vincent and the Grenadines' entitlement to compensation included damages for injury to the crew, their unlawful arrest, detention and other forms of ill-treatment.

(18) Historically compensation for personal injury suffered by nationals or officials of a State arose mainly in the context of mixed claims commissions dealing with State responsibility for injury to aliens. Claims commissions awarded compensation for personal injury both in cases of wrongful death and deprivation of liberty. Where claims were made in respect of wrongful death, damages were generally based on an evaluation of the losses of the surviving heirs or successors, calculated in accordance with the well-known formula of Umpire Parker in the *"Lusitania"* case, estimating:

> "the amounts (a) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (c) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as [the] claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant."[576]

In cases of deprivation of liberty, arbitrators sometimes awarded a set amount for each day spent in detention.[577] Awards were often increased when abusive conditions of confinement accompanied the wrongful arrest and imprisonment, resulting in particularly serious physical or psychological injury.[578]

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[575] *The M/V "Saiga" (No.2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, judgment of 1 July 1999.

[576] *UNRIAA*, vol. VII, p. 32 (1923), at p. 35.

[577] E.g. *Topaze*, ibid., vol. IX, p. 387 (1903), at p. 389; *Faulkner*, ibid., vol. IV, p. 67 (1926), at p. 71.

[578] E.g. *William McNeil*, ibid., vol. V, p. 164 (1931), at p. 168.

(19) Compensation for personal injury has also been dealt with by human rights bodies, in particular the European and Inter-American Court of Human Rights. Awards of compensation encompass material losses (loss of earnings, pensions, medical expenses etc.) and non-material damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment. Hitherto, amounts of compensation or damages awarded or recommended by these bodies have been modest.[579] Nonetheless, the decisions of human rights bodies on compensation draw on principles of reparation under general international law.[580]

(20) In addition to a large number of lump-sum compensation agreements covering multiple claims,[581] property claims of nationals arising out of an internationally wrongful act have been adjudicated by a wide range of ad hoc and standing tribunals and commissions, with reported cases spanning two centuries. Given the diversity of adjudicating bodies, the awards exhibit considerable variability.[582] Nevertheless, they provide useful principles to guide the determination of compensation under this head of damage.

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[579] See the review by D. Shelton, *Remedies in International Human Rights Law* (Oxford, Clarendon Press, 1999), chs. 8, 9; A. Randelzhofer & C. Tomuschat (eds.), *State Responsibility and the Individual. Reparation in Instances of Grave Violations of Human Rights* (The Hague, Nijhoff, 1999); R. Pisillo Mazzeschi, "La riparazione per violazione dei diritti umani nel diritto internazionale e nella Convenzione Europea", *La Comunità Internazionale*, vol. 53 (1998), p. 215.

[580] See e.g. the decision of the Inter-American Court in the *Velásquez Rodríguez, Inter-Am.Ct.H.R., Series C, No. 4* (1989) at pp. 26-27, 30-1. Cf. also *Papamichalopoulos v. Greece (Article 50), E.C.H.R., Series A, No. 330-B* (1995), at para. 36.

[581] See e.g. R.B. Lillich & B.H. Weston, *International Claims: Their Settlement by Lump Sum Agreements* (Charlottesville, University Press of Virginia, 1975); B.H. Weston, R.B. Lillich and D.J. Bederman, *International Claims: Their Settlement by Lump Sum Agreements, 1975-1995* (Ardsley, N.Y., Transnational Publishers, 1999).

[582] Controversy has persisted in relation to expropriation cases, particularly over standards of compensation applicable in light of the distinction between lawful expropriation of property by the State on the one hand, and unlawful takings on the other, a distinction clearly drawn by the Permanent Court in *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17* p. 47. In a number of cases tribunals have employed the distinction to rule in favour of compensation for lost profits in cases of unlawful takings (see e.g. the observations of the arbitrator in *Libyan American Oil Company (LIAMCO) v. Government of Libya*, (1982) *I.L.R.*, vol. 62, p. 141, at pp. 202-203; and also the *Aminoil* arbitration: *Government of Kuwait v. American Independent Oil Company*, (1982) *I.L.R.*, vol. 66, p. 529, at p. 600, para. 138; and *Amoco International*

(21) The reference point for valuation purposes is the loss suffered by the claimant whose property rights have been infringed. This loss is usually assessed by reference to specific heads of damage relating to (i) compensation for capital value, (ii) compensation for loss of profits, and (iii) incidental expenses.

(22) Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the "fair market value" of the property lost.[583] The method used to assess "fair market value", however, depends on the nature of the asset concerned. Where the property in question or comparable property is freely traded on an open market, value is more readily determined. In such cases, the choice and application of asset-based valuation methods based on market data and the physical properties of the assets is relatively unproblematic, apart from evidentiary difficulties associated with long outstanding

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Finance Corporation v. Government of the Islamic Republic of Iran, (1987) 15 *Iran-U.S.C.T.R.* 189, at p. 246, para. 192). Not all cases, however, have drawn a distinction between the applicable compensation principles based on the lawfulness or unlawfulness of the taking. See e.g. the decision of the Iran-United States Tribunal in *Phillips Petroleum Co. Iran v. Government of the Islamic Republic of Iran*, (1989) 21 *Iran-U.S.C.T.R.* 79, at p. 122, para. 110. See also *Starrett Housing Corp. v. Government of the Islamic Republic of Iran*, (1987) 16 *Iran-U.S.C.T.R.* 79 where the Tribunal made no distinction in terms of the lawfulness of the taking and its award included compensation for lost profits.

[583] See *American International Group, Inc. v. Government of the Islamic Republic of Iran*, which stated that, under general international law, "the valuation should be made on the basis of the fair market value of the shares": (1983) 4 *Iran-U.S.C.T.R.* 96, at p.106. In *Starrett Housing Corp. v. Government of the Islamic Republic of Iran*, the Tribunal accepted its expert's concept of fair market value "as the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat": (1987) 16 *Iran-U.S.C.T.R.* 112, at p. 201. See also the *World Bank Guidelines on the Treatment of Foreign Direct Investment*, which state in paragraph 3 of Part IV that compensation "will be deemed adequate if it is based on the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known": World Bank, *Legal Framework for the Treatment of Foreign Investment*, 2 vols., (Washington, I.B.R.D., 1992), vol. II, p. 41. Likewise, according to Article 13 (1) of the Energy Charter Treaty, *I.L.M.*, vol. 33 (1994), p. 360, compensation for expropriation "shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation ..."

claims.[584] Where the property interests in question are unique or unusual, for example, art works or other cultural property,[585] or are not the subject of frequent or recent market transactions, the determination of value is more difficult. This may be true, for example, in respect of certain business entities in the nature of a going concern, especially if shares are not regularly traded.[586]

(23) Decisions of various ad hoc tribunals since 1945 have been dominated by claims in respect of nationalized business entities. The preferred approach in these cases has been to examine the assets of the business, making allowance for goodwill and profitability as appropriate. This method has the advantage of grounding compensation as much as possible in some objective assessment of value linked to the tangible asset backing of the business. The value of goodwill and other indicators of profitability may be uncertain, unless derived from information provided by a recent sale or acceptable arms-length offer. Yet, for profitable business entities where the whole is greater than the sum of the parts, compensation would be incomplete without paying due regard to such factors.[587]

(24) An alternative valuation method for capital loss is the determination of net book value, i.e., the difference between the total assets of the business and total liabilities as shown on its books. Its advantages are that the figures can be determined by reference to market costs, they

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[584] Particularly in the case of lump sum settlements, agreements have been concluded decades after the claims arose. See e.g. the U.S.S.R.-U.K. Agreement of 15 July 1986 concerning claims dating back to 1917 and the China-U.K. Agreement of 5 June 1987 in respect of claims arising in 1949. In such cases, the choice of valuation method was sometimes determined by availability of evidence.

[585] See Report and Recommendations Made by the Panel of Commissioners concerning Part Two of the First Instalment of Individual Claims for Damages above US$ 100,000, 12 March 1998, S/AC.26/1998/3, paras. 48-49, where the U.N.C.C. considered a compensation claim in relation to the taking of the claimant's Islamic art collection by Iraqi military personnel.

[586] Where share prices provide good evidence of value, they may be utilized, as in *INA Corporation v. Islamic Republic of Iran*, (1985) 8 *Iran-U.S.C.T.R.* 373.

[587] Early claims recognized that that even where a taking of property was lawful, compensation for a going concern called for something more than the value of the property elements of the business. The American-Mexican Claims Commission in rejecting a claim for lost profits in the case of a lawful taking stated that payment for property elements would be "augmented by the existence of those elements which constitute a going concern": *Wells Fargo and Company v. Mexico (Decision No. 22-B)*, American-Mexican Claims Commission (1926), p. 153. See also Decision No. 9 of the United Nations Compensation Commission Governing Council, S/AC.26/1992/9, para. 16.

are normally drawn from a contemporaneous record, and they are based on data generated for some other purpose than supporting the claim. Accordingly, net book value (or some variant of this method) has been employed to assess the value of businesses. The limitations of the method lie in the reliance on historical figures, the use of accounting principles which tend to undervalue assets, especially in periods of inflation, and the fact that the purpose for which the figures were produced does not take account of the compensation context and any rules specific to it. The balance sheet may contain an entry for goodwill, but the reliability of such figures depends upon their proximity to the moment of an actual sale.

(25) In cases where a business is not a going concern,[588] so-called "break-up", "liquidation" or "dissolution" value is generally employed. In such cases no provision is made for value over and above the market value of the individual assets. Techniques have been developed to construct, in the absence of actual transactions, hypothetical values representing what a willing buyer and willing seller might agree.[589]

(26) Since 1945, valuation techniques have been developed to factor in different elements of risk and probability.[590] The discounted cash flow (DCF) method has gained some favour, especially in the context of calculations involving income over a limited duration, as in the case of wasting assets. Although developed as a tool for assessing commercial value, it can also be

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[588] For an example of a business found not to be a going concern see *Phelps Dodge Corp. v. Islamic Republic of Iran*, (1986) 10 *Iran-U.S.C.T.R.* 121 where the enterprise had not been established long enough to demonstrate its viability. In *Sedco v. NIOC*, claimant sought dissolution value only: (1986) 10 *Iran-U.S.C.T.R.* 180.

[589] The hypothetical nature of the result is discussed in *Amoco International Finance Corp. v. Islamic Republic of Iran*, (1987) 15 *Iran-U.S.C.T.R.* 189, at pp. 256-7, paras. 220-223.

[590] See for example the detailed methodology developed by the U.N.C.C. for assessing Kuwaiti corporate claims (Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of "E4" Claims, 19 March 1999, S/AC.26/1999/4, paras 32-62) and claims filed on behalf of non-Kuwaiti corporations and other business entities, excluding oil sector, construction/engineering and export guarantee claims (Report and Recommendations made by the Panel of Commissioners concerning the Third Instalment of "E2" Claims, 9 December 1999, S/AC.26/1999/22).

useful in the context of calculating value for compensation purposes.[591] But difficulties can arise in the application of the DCF method to establish capital value in the compensation context. The method analyses a wide range of inherently speculative elements, some of which have a significant impact upon the outcome (e.g. discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks). This has led tribunals to adopt a cautious approach to the use of the method. Hence although income-based methods have been accepted in principle, there has been a decided preference for asset-based methods.[592] A particular concern is the risk of double-counting which arises from the relationship between the capital value of an enterprise and its contractually based profits.[593]

(27) Paragraph 2 of article 36 recognizes that in certain cases compensation for loss of profits may be appropriate. International tribunals have included an award for loss of profits in assessing compensation: for example the decisions in the *Cape Horn Pigeon* case[594] and

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[591] The use of the discounted cash flow method to assess capital value was analysed in some detail in *Amoco International Finance Corp. v. Islamic Republic of Iran*, (1987) 15 *Iran-U.S.C.T.R.* 189; *Starrett Housing Corp. v. Islamic Republic of Iran*, (1987) 16 *Iran-U.S. C.T.R.* 112; *Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, (1989) 21 *Iran U.S.C.T.R.* 79; and *Ebrahimi (Shahin Shaine) v. Islamic Republic of Iran*, (1994) 30 *Iran U.S.C.T.R.* 170.

[592] See e.g. *Amoco International Finance Corp. v. Islamic Republic of Iran*, 15 *Iran-U.S.C.T.R.* 189 (1987); *Starrett Housing Corp. v. Islamic Republic of Iran*, 16 *Iran-U.S.C.T.R.* 112 (1987), *Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, 21 *Iran-U.S.C.T.R.* 79 (1989). In the context of claims for lost profits, there is a corresponding preference for claims to be based on past performance rather than forecasts. For example, the United Nations Compensation Commission guidelines on valuation of business losses in Decision 9 (S/AC.26/1992/9, para. 19) state: "The method of a valuation should therefore be one that focuses on past performance rather than on forecasts and projections into the future."

[593] See e.g. *Ebrahimi (Shahin Shaine) v. Islamic Republic of Iran*, (1994) 30 *Iran-U.S.C.T.R.* 170, para. 159.

[594] *United States of America v. Russia, UNRIAA*, vol. IX, p. 63 (1902), (including compensation for lost profits resulting from the seizure of an American whaler). Similar conclusions were reached in the *Delagoa Bay Railway* case (1900), Martens, *Nouveau Recueil*, 2nd series, vol. XXX, p. 329; Moore, *International Arbitrations*, vol. II, p. 1865 (1900), the *William Lee* case, Moore, *International Arbitrations*, vol. IV, pp. 3405-3407 (1867) and the *Yuille Shortridge and Co.* case *(Great Britain v. Portugal)*, de Lapradelle & Politis, *Recueil des arbitrages internationaux,* vol. II, p. 78 (1861). Contrast the decisions in the *Canada* case *(United States of America v. Brazil)*, Moore, *International Arbitrations*, vol. II, p. 1733 (1870) and the *Lacaze* case, de Lapradelle & Politis, *Recueil des arbitrages internationaux*, vol. II, p. 290.

Sapphire International Petroleums Ltd. v. National Iranian Oil Company.[595] Loss of profits played a role in the *Factory at Chorzów* case itself, the Permanent Court deciding that the injured party should receive the value of property by way of damages not as it stood at the time of expropriation but at the time of indemnification.[596] Awards for loss of profits have also been made in respect of contract-based lost profits in *Libyan American Oil Company (LIAMCO) v. Libya*[597] and in some I.C.S.I.D. arbitrations.[598] Nevertheless, lost profits have not been as commonly awarded in practice as compensation for accrued losses. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements.[599] When compared with tangible assets, profits (and intangible assets which are income-based) are relatively vulnerable to commercial and political risks, and increasingly so the further into the future projections are made. In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable.[600] This has normally been achieved by virtue of contractual arrangements or, in some cases, a well-established history of dealings.[601]

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[595] (1963) *I.L.R.*, vol. 35, p.136, at pp. 187, 189.

[596] *Factory at Chorzów (Merits), 1928, P.C.I.J. Series A, No. 17*, pp. 47-48, 53.

[597] (1977) *I.L.R.*, vol. 62, p. 140.

[598] See, e.g., *Amco Asia Corp. and Others v. Republic of Indonesia*, First Arbitration (1984); Annulment (1986); Resubmitted Case, (1990) 1 *I.C.S.I.D. Reports* 377; *AGIP Spa v. Government of the People's Republic of the Congo*, (1979) 1 *I.C.S.I.D. Reports* 306.

[599] According to the arbitrator in the *Shufeldt (USA/Guatemala)* case, *UNRIAA*, vol. II, p. 1079 (1930), at p. 1099, "the *lucrum cessans* must be the direct fruit of the contract and not too remote or speculative". See also *Amco Asia Corp. and Others v. Republic of Indonesia*, (1990) 1 *I.C.S.I.D. Reports* 569, at p. 612, para. 178 where it was stated that "non-speculative profits" were recoverable. The U.N.C.C. has also stressed the requirement for claimants to provide "clear and convincing evidence of ongoing and expected profitability" (see Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of "E3" Claims, 17 December 1998 (S/AC.26/1998/13), para. 147). In assessing claims for lost profits on construction contracts, Panels have generally required that the claimant's calculation take into account the risk inherent in the project (ibid., para. 157; Report and Recommendations made by the Panel of Commissioners concerning the Fourth Instalment of "E3" Claims, 30 September 1999 (S/AC.26/1999/14), para. 126).

(28) Three categories of loss of profits may be distinguished: first, lost profits from income-producing property during a period when there has been no interference with title as distinct from temporary loss of use; secondly, lost profits from income-producing property between the date of taking of title and adjudication,[602] and thirdly, lost future profits in which profits anticipated after the date of adjudication are awarded.[603]

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[600] In considering claims for future profits, the U.N.C.C. Panel dealing with the fourth instalment of "E3" claims expressed the view that in order for such claims to warrant a recommendation, "it is necessary to demonstrate by sufficient documentary and other appropriate evidence a history of successful (i.e. profitable) operation, and a state of affairs which warrants the conclusion that the hypothesis that there would have been future profitable contracts is well founded": Report and Recommendations made by the Panel of Commissioners concerning the Fourth Instalment of "E3" Claims, 30 September 1999, (S/AC.26/1999/14), para. 140.

[601] According to Whiteman, "in order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were *reasonably* anticipated; and that the profits anticipated were probable and not merely possible": Whiteman, *Damages*, vol. III, p. 1837.

[602] This is most commonly associated with the deprivation of property, as opposed to wrongful termination of a contract or concession. If restitution were awarded, the award of lost profits would be analogous to cases of temporary dispossession. If restitution is not awarded, as in the *Factory at Chorzów (Merits), 1928, P.C.I.J. Series A, No. 17*, p. 47 and *Norwegian Shipowners (Norway/USA), UNRIAA*, vol. I, p. 307 (1922), lost profits may be awarded up to the time when compensation is made available as a substitute for restitution.

[603] Awards of lost future profits have been made in the context of a contractually protected income stream, as in the *Amco Asia* case *(Amco Asia Corp. and Others v. Republic of Indonesia*, First Arbitration (1984); Annulment (1986); Resubmitted Case, (1990) 1 *I.C.S.I.D. Reports* 377), rather than on the basis of the taking of income-producing property. In the UN Compensation Commission's Report and Recommendations on the Second Instalment of "E2" Claims (S/AC.26/1999/6), dealing with reduced profits, the Panel found that losses arising from a decline in business were compensable even though tangible property was not affected and the businesses continued to operate throughout the relevant period (ibid., para. 76).

(29) The first category involves claims for loss of profits due to the temporary loss of use and enjoyment of the income-producing asset.[604] In these cases there is no interference with title and hence in the relevant period the loss compensated is the income to which the claimant was entitled by virtue of undisturbed ownership.

(30) The second category of claims relates to the unlawful taking of income-producing property. In such cases lost profits have been awarded for the period up to the time of adjudication. In the *Factory at Chorzów* case,[605] this took the form of re-invested income, representing profits from the time of taking to the time of adjudication. In the *Norwegian Shipowners* case,[606] lost profits were similarly not awarded for any period beyond the date of adjudication. Once the capital value of income-producing property has been restored through the mechanism of compensation, funds paid by way of compensation can once again be invested to re-establish an income stream. Although the rationale for the award of lost profits in these cases is less clearly articulated, it may be attributed to a recognition of the claimant's continuing beneficial interest in the property up to the moment when potential restitution is converted to a compensation payment.[607]

(31) The third category of claims for loss of profits arises in the context of concessions and other contractually protected interests. Again, in such cases, lost future income has sometimes been awarded.[608] In the case of contracts, it is the future income stream which is compensated,

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[604] Many of the early cases concern vessels seized and detained. In *The "Montijo"*, an American vessel seized in Panama, the Umpire allowed a sum of money per day for loss of the use of the vessel: Moore, *International Arbitrations*, vol. II, p. 1421 (1875). In *The "Betsey"*, compensation was awarded not only for the value of the cargo seized and detained, but also for demurrage for the period representing loss of use: Moore, *International Adjudications*, vol. V, p. 47, at p. 113 (1794).

[605] *Factory at Chorzów (Merits), 1928, P.C.I.J. Series A, No. 17*, p. 47.

[606] *Norwegian Shipowners (Norway/USA), UNRIAA*, vol. I, p. 307 (1922).

[607] For the approach of the U.N.C.C. in dealing with loss of profits claims associated with the destruction of businesses following the Iraqi invasion of Kuwait, see Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of "E4" Claims, 19 March 1999, (S/AC.26/1999/4), paras. 184-187.

[608] In some cases, lost profits were not awarded beyond the date of adjudication, though for reasons unrelated to the nature of the income-producing property. See e.g., *Robert May (United States v. Guatemala)*, 1900 For. Rel. 648; Whiteman, *Damages*, vol III, pp. 1704, 1860,

up to the time when the legal recognition of entitlement ends. In some contracts this is immediate, e.g. where the contract is determinable at the instance of the State,[609] or where some other basis for contractual termination exists. Or it may arise from some future date dictated by the terms of the contract itself.

(32) In other cases lost profits have been excluded on the basis that they were not sufficiently established as a legally protected interest. In the *Oscar Chinn* case[610] a monopoly was not accorded the status of an acquired right. In the *Asian Agricultural Products* case,[611] a claim for lost profits by a newly established business was rejected for lack of evidence of established earnings. Claims for lost profits are also subject to the usual range of limitations on the recovery of damages, such as causation, remoteness, evidentiary requirements and accounting principles, which seek to discount speculative elements from projected figures.

(33) If loss of profits are to be awarded, it is inappropriate to award interest under article 38 on the profit-earning capital over the same period of time, simply because the capital sum cannot be simultaneously earning interest and generating profits. The essential aim is to avoid double recovery while ensuring full reparation.

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where the concession had expired. In other cases, circumstances giving rise to *force majeure* had the effect of suspending contractual obligations: see e.g. *Gould Marketing, Inc. v. Ministry of Defence*, (1984) 6 *Iran-U.S.C.T.R.* 272; *Sylvania Technical Systems v. Islamic Republic of Iran*, (1985) 8 *Iran-U.S.C.T.R.* 298. In *Delagoa Bay Railway Co. (Great Britain, United States of America/Portugal)*, Martens, *Nouveau Recueil*, 2nd series, vol. XXX, p. 329; Moore, *International Arbitrations*, vol. II, p. 1865 (1900), and in *Shufeldt (USA/Guatemala)*, *UNRIAA*, vol. II, p. 1079 (1930), lost profits were awarded in respect of a concession which had been terminated. In *Sapphire International Petroleum Ltd v. National Iranian Oil Company*, (1963) *I.L.R.*, vol. 35, p. 136; *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic*, (1977) *I.L.R.*, vol. 62, p. 140 and *Amco Asia Corp. and Others v. Republic of Indonesia*, First Arbitration (1984); Annulment (1986); Resubmitted Case (1990), 1 *I.C.S.I.D. Reports* 377, awards of lost profits were also sustained on the basis of contractual relationships.

[609] As in *Sylvania Technical Systems v. Islamic Republic of Iran*, (1985) 8 *Iran-U.S.C.T.R.* 298.

[610] *1934, P.C.I.J., Series A/B, No. 63,* p. 65.

[611] *Asian Agricultural Products Ltd v. Democratic Socialist Republic of Sri Lanka,* (1990) 4 *I.C.S.I.D. Reports* 245.

(34) It is well established that incidental expenses are compensable if they were reasonably incurred to repair damage and otherwise mitigate loss arising from the breach.[612] Such expenses may be associated for example with the displacement of staff or the need to store or sell undelivered products at a loss.

Article 37

Satisfaction

> 1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
>
> 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
>
> 3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Commentary

(1) Satisfaction is the third form of reparation which the responsible State may have to provide in discharge of its obligation to make full reparation for the injury caused by an internationally wrongful act. It is not a standard form of reparation, in the sense that in many cases the injury caused by an internationally wrongful act of a State may be fully repaired by restitution and/or compensation. The rather exceptional character of the remedy of satisfaction, and its relationship to the principle of full reparation, are emphasized by the phrase "insofar as [the injury] cannot be made good by restitution or compensation". It is only in those cases where those two forms have not provided full reparation that satisfaction may be required.

(2) Article 37 is divided into three paragraphs, each dealing with a separate aspect of satisfaction. Paragraph 1 addresses the legal character of satisfaction and the types of injury for which it may be granted. Paragraph 2 describes, in a non-exhaustive fashion, some modalities of

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[612] Compensation for incidental expenses has been awarded by the United Nations Compensation Commission (Report and Recommendations on the First Instalment of "E2" Claims (S/AC.26/1998/7) where compensation was awarded for evacuation and relief costs (paras. 133, 153 and 249), repatriation (para. 228), termination costs (para. 214), renovation costs (para. 225) and expenses in mitigation (para. 183)) and by the Iran-United States Claims Tribunal (see *General Electric Company v. Islamic Republic of Iran*, (1991) 26 *Iran-U.S.C.T.R.* 148, at pp. 165-167, 168-169, paras. 56-60, 67-69, awarding compensation for items resold at a loss and for storage costs).

satisfaction. Paragraph 3 places limitations on the obligation to give satisfaction, having regard to former practices in cases where unreasonable forms of satisfaction were sometimes demanded.

(3) In accordance with paragraph 1, the injury for which a responsible State is obliged to make full reparation embraces "any damage, whether material or moral, caused by the internationally wrongful act of a State." Material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation. Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned.

(4) The availability of the remedy of satisfaction for injury of this kind, sometimes described as "non-material injury",[613] is well-established in international law. The point was made, for example, by the Tribunal in the *Rainbow Warrior* arbitration:

> "There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities".[614]

State practice also provides many instances of claims for satisfaction in circumstances where the internationally wrongful act of a State causes non-material injury to another State. Examples include situations of insults to the symbols of the State, such as the national flag,[615] violations of sovereignty or territorial integrity,[616] attacks on ships or aircraft,[617] ill-treatment of or deliberate attacks on heads of State or Government or diplomatic or consular representatives or other protected persons[618] and violations of the premises of embassies or consulates or of the residences of members of the mission.[619]

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[613] See C. Dominicé, "De la réparation constructive du préjudice immatériel souffert par un État", in *L'ordre juridique international entre tradition et innovation; Recueil d'études* (Paris, P.U.F., 1997) p. 349, at p. 354.

[614] *Rainbow Warrior (New Zealand/France), UNRIAA*, vol. XX, p. 217 (1990), at pp. 272-273, para. 122.

[615] Examples are the *Magee* case (1874) (Whiteman, *Damages*, vol. I, p. 64), the *Petit Vaisseau* case (1863) (Whiteman, *Damages*, 2nd series, vol. III, No. 2564) and the case that arose from the insult to the French flag in Berlin in 1920 (C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), pp. 186-187).

(5) Paragraph 2 of article 37 provides that satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. The forms of satisfaction listed in the article are no more than examples. The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.[620] Many possibilities exist, including due inquiry into the causes of an accident resulting in harm or

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[616] As occurred in the *Rainbow Warrior* arbitration, *UNRIAA*, vol. XX, p. 217 (1990).

[617] Examples include the attack carried out in 1961 against a Soviet aircraft transporting President Brezhnev by French fighter planes over the international waters of the Mediterranean (*R.G.D.I.P.*, vol. 65 (1961), p. 603); and the sinking of a Bahamian ship in 1980 by a Cuban aircraft (*R.G.D.I.P.*, vol. 84 (1980), pp. 1078-1079).

[618] See F. Przetacznik, "La responsabilité internationale de l'Etat à raison des préjudices de caractère moral et politique causés à un autre Etat", *R.G.D.I.P.*, vol. 78 (1974), p. 917, at p. 951.

[619] Examples include the attack by demonstrators in 1851 on the Spanish Consulate in New Orleans (Moore, *Digest*, vol. VI, p. 811, at p. 812), and the failed attempt of two Egyptian policemen, in 1888, to intrude upon the premises of the Italian Consulate at Alexandria (*La prassi italiana di diritto internazionale*, 2nd series, (Dobbs Ferry, N.Y., Oceana, 1970) vol. III, No. 2558). Also see cases of apologies and expressions of regret following demonstrations in front of the French Embassy in Belgrade in 1961 (*R.G.D.I.P.*, vol. 65 (1961), p. 610), and the fires in the libraries of the United States Information Services in Cairo in 1964 (*R.G.D.I.P.*, vol. 69 (1965), pp. 130-131) and in Karachi in 1965 (*R.G.D.I.P.*, vol. 70 (1966), pp. 165-166).

[620] In the *Rainbow Warrior* arbitration the Tribunal, while rejecting New Zealand's claims for restitution and/or cessation and declining to award compensation, made various declarations by way of satisfaction, and in addition a recommendation "to assist [the parties] in putting an end to the present unhappy affair". Specifically it recommended that France contribute US$2 million to a fund to be established "to promote close and friendly relations between the citizens of the two countries". See *UNRIAA*, vol. XX, p. 217 (1990), at p. 274, paras. 126-127. See further L. Migliorino, "Sur la déclaration d'illiceité comme forme de satisfaction: à propos de la sentence arbitrale du 30 avril 1990 dans l'affaire du Rainbow warrior", *R.G.D.I.P.*, vol. 96 (1992), p. 61.

injury,[621] a trust fund to manage compensation payments in the interests of the beneficiaries, disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act[622] or the award of symbolic damages for non-pecuniary injury.[623] Assurances or guarantees of non-repetition, which are dealt with in the Articles in the context of cessation, may also amount to a form of satisfaction.[624] Paragraph 2 does not attempt to list all the possibilities, but neither is it intended to exclude them. Moreover the order of the modalities of satisfaction in paragraph 2 is not intended to reflect any hierarchy or preference. Paragraph 2 simply gives examples which are not listed in order of appropriateness or seriousness. The appropriate mode, if any, will be determined having regard to the circumstances of each case.

(6) One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal. The utility of declaratory relief as a form of satisfaction in the case of non-material injury to a State was affirmed by the International Court in the *Corfu Channel* case, where the Court, after finding unlawful a mine-sweeping operation (Operation Retail) carried out by the British Navy after the explosion, said:

> "to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty. This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction."[625]

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[621] E.g. the United States naval inquiry into the causes of the collision between an American submarine and the Japanese fishing vessel, the *Ehime Maru*, in waters off Honolulu: *New York Times*, 8 February 2001, section 1, p. 1, col. 6.

[622] Action against the guilty individuals was requested in the case of the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations (Whiteman, *Digest*, vol. 8, pp. 742-743) and in the case of the killing of two United States officers in Tehran (*R.G.D.I.P.*, vol. 80, p. 257).

[623] See, e.g., *The "I'm Alone"*, *UNRIAA*, vol. III, p. 1609 (1935); *Rainbow Warrior*, ibid., vol. XX, p. 217 (1990).

[624] See commentary to article 30, para. (11).

[625] *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 4, at p. 35, repeated in the *dispositif* at p. 36.

This has been followed in many subsequent cases.[626] However, while the making of a declaration by a competent court or tribunal may be treated as a form of satisfaction in a given case, such declarations are not intrinsically associated with the remedy of satisfaction. Any court or tribunal which has jurisdiction over a dispute has the authority to determine the lawfulness of the conduct in question and to make a declaration of its findings, as a necessary part of the process of determining the case. Such a declaration may be a preliminary to a decision on any form of reparation, or it may be the only remedy sought. What the Court did in the *Corfu Channel* case was to use a declaration as a form of satisfaction in a case where Albania had sought no other form. Moreover such a declaration has further advantages: it should be clear and self-contained and will by definition not exceed the scope or limits of satisfaction referred to in paragraph 3 of article 37. A judicial declaration is not listed in paragraph 2 only because it must emanate from a competent third party with jurisdiction over a dispute, and the Articles are not concerned to specify such a party or to deal with issues of judicial jurisdiction. Instead, article 37 specifies the acknowledgement of the breach by the responsible State as a modality of satisfaction.

(7) Another common form of satisfaction is an apology, which may be given verbally or in writing by an appropriate official or even the head of State. Expressions of regret or apologies were required in the *"I'm Alone"*,[627] *Kellet*[628] and *Rainbow Warrior* cases,[629] and were offered by the responsible State in the *Consular Relations*[630] and *LaGrand* cases.[631] Requests for, or offers of, an apology are a quite frequent feature of diplomatic practice and the tender of a timely apology, where the circumstances justify it, can do much to resolve a dispute. In other

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[626] E.g., *Rainbow Warrior*, *UNRIAA*, vol. XX, p. 217 (1990), at p. 273, para. 123.

[627] Ibid., vol. III, p. 1609 (1935).

[628] Moore, *Digest*, vol. V, p. 43 (1897).

[629] *UNRIAA*, vol. XX, p. 217 (1990).

[630] *Vienna Convention on Consular Relations (Paraguay v. United States), Provisional Measures*, *I.C.J. Reports 1998*, p. 248. For the text of the United States' apology see U.S. Department of State, Text of Statement Released in Asunción, Paraguay; Press Statement by James P. Rubin, Spokesman, 4 November 1998. For the order discontinuing proceedings, see *I.C.J. Reports 1998*, p. 426.

[631] *LaGrand (Germany v. United States of America), Provisional Measures*, *I.C.J. Reports 1999*, p. 9, and *LaGrand (Germany v. United States of America), Merits*, judgment of 27 June 2001.

circumstances an apology may not be called for, e.g. where a case is settled on an ex gratia basis, or it may be insufficient. In the *LaGrand* case the Court considered that "an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties".[632]

(8) Excessive demands made under the guise of "satisfaction" in the past[633] suggest the need to impose some limit on the measures that can be sought by way of satisfaction to prevent abuses, inconsistent with the principle of the equality of States.[634] In particular, satisfaction is not intended to be punitive in character, nor does it include punitive damages. Paragraph 3 of article 37 places limitations on the obligation to give satisfaction by setting out two criteria: first, the proportionality of satisfaction to the injury; second, the requirement that satisfaction should not be humiliating to the responsible State. It is true that the term "humiliating" is imprecise, but there are certainly historical examples of demands of this kind.

Article 38

Interest

> 1. Interest on any principal sum payable under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
>
> 2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

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[632] Ibid., para. 123.

[633] E.g., the joint note presented to the Chinese Government in 1900 following the Boxer uprising and the demand by the Conference of Ambassadors against Greece in the "Tellini" affair in 1923: see C. Eagleton, *The Responsibility of States in International Law* (New York, New York University Press, 1928), pp. 187-188.

[634] The need to prevent the abuse of satisfaction was stressed by early writers such as J.C. Bluntschli, *Das moderne Völkerrecht der civilisierten Staten als Rechtsbuch dargestellt*, (3rd edn.) (Nördlingen, 1878); French trans. by C. Lardy, *Le droit international codifié*, (5th rev. edn.) (Paris, 1895), pp. 268-269.

Commentary

(1) Interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case. For this reason the term "principal sum" is used in article 38 rather than "compensation". Nevertheless, an award of interest may be required in some cases in order to provide full reparation for the injury caused by an internationally wrongful act, and it is normally the subject of separate treatment in claims for reparation and in the awards of tribunals.

(2) As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgment or award concerning, the claim and to the extent that it is necessary to ensure full reparation.[635] Support for a general rule favouring the award of interest as an aspect of full reparation is found in international jurisprudence.[636] In *The S.S. "Wimbledon"*, the Permanent Court awarded simple interest at 6 per cent as from the date of judgment, on the basis that interest was only payable "from the moment when the amount of the sum due has been fixed and the obligation to pay has been established".[637]

(3) Issues of the award of interest have frequently arisen in other tribunals, both in cases where the underlying claim involved injury to private parties and where the injury was to the State itself.[638] The experience of the Iran-United States Claims Tribunal is worth noting. In *Islamic Republic of Iran v. United States of America (Case A-19)*, the Full Tribunal held that its general jurisdiction to deal with claims included the power to award interest, but it declined to

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[635] Thus interest may not be allowed where the loss is assessed in current value terms as at the date of the award. See the *Lighthouses* arbitration, *UNRIAA*, vol. XII, p. 155 (1956), at pp. 252-253.

[636] See, e.g., the awards of interest made in the *Illinois Central Railroad* case, *UNRIAA*, vol. IV, p. 134 (1926); the *Lucas* case (1966) *I.L.R.*, vol. 30, p. 220; see also *Administrative Decision No. III* of the United States-German Mixed Claims Commission, *UNRIAA*, vol. VII, pp. 66 (1923).

[637] *1923, P.C.I.J., Series A, No. 1*, p. 32. The Court accepted the French claim for an interest rate of 6 per cent as fair, having regard to "the present financial situation of the world and … the conditions prevailing for public loans".

[638] In *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, the International Tribunal on the Law of the Sea awarded interest at different rates in respect of different categories of loss: see judgment of 1 July 1999, para. 173.

lay down uniform standards for the award of interest on the ground that this fell within the jurisdiction of each Chamber and related "to the exercise … of the discretion accorded to them in deciding each particular case".[639] On the issue of principle the Tribunal said:

> "Claims for interest are part of the compensation sought and do not constitute a separate cause of action requiring their own independent jurisdictional grant. This Tribunal is required by Article V of the Claims Settlement Declaration to decide claims 'on the basis of respect for law'. In doing so, it has regularly treated interest, where sought, as forming an integral part of the 'claim' which it has a duty to decide. The Tribunal notes that the Chambers have been consistent in awarding interest as 'compensation for damages suffered due to delay in payment'… Indeed, it is customary for arbitral tribunals to award interest as part of an award for damages, notwithstanding the absence of any express reference to interest in the *compromis.* Given that the power to award interest is inherent in the Tribunal's authority to decide claims, the exclusion of such power could only be established by an express provision in the Claims Settlement Declaration. No such provision exists. Consequently, the Tribunal concludes that it is clearly within its power to award interest as compensation for damage suffered."[640]

The Tribunal has awarded interest at a different and slightly lower rate in respect of intergovernmental claims.[641] It has not awarded interest in certain cases, for example where a lump-sum award was considered as reflecting full compensation, or where other special circumstances pertained.[642]

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[639] (1987) 16 *Iran-U.S.C.T.R.* 285, at p. 290. G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996) pp. 475-6 points out, the practice of the three Chambers has not been entirely uniform.

[640] (1987) 16 *Iran-U.S.C.T.R.* 285, at pp. 289-90.

[641] See C.N. Brower & J.D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague, Nijhoff, 1998), pp. 626-7, with references to the cases. The rate adopted was 10 per cent, as compared with 12 per cent for commercial claims.

[642] See the detailed analysis of Chamber Three in *McCollough & Co. Inc. v. Ministry of Post, Telegraph & Telephone & Others,* (1986) 11 *Iran-U.S.C.T.R.* 3, at pp. 26-31.

(4) Decision 16 of the Governing Council of the United Nations Compensation Commission deals with the question of interest. It provides:

> "1. Interest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.
>
> 2. The methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time.
>
> 3. Interest will be paid after the principal amount of awards."[643]

This provision combines a decision in principle in favour of interest where necessary to compensate a claimant with flexibility in terms of the application of that principle. At the same time, interest, while a form of compensation, is regarded as a secondary element, subordinated to the principal amount of the claim.

(5) Awards of interest have also been envisaged by human rights courts and tribunals, even though the compensation practice of these bodies is relatively cautious and the claims are almost always unliquidated. This is done, for example, to protect the value of a damages award payable by instalments over time.[644]

(6) In their more recent practice, national compensation commissions and tribunals have also generally allowed for interest in assessing compensation. However in certain cases of partial lump-sum settlements, claims have been expressly limited to the amount of the principal loss, on the basis that with a limited fund to be distributed, claims to principal should take priority.[645]

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[643] "Awards of Interest", Decision 16 of 4 January 1993 (S/AC.26/1992/16).

[644] See e.g. *Velásquez Rodriguez (Compensatory Damages) Inter-Am.Ct.H.R., Series C, No. 7* (1990), para. 57. See also *Papamichalopoulos v. Greece (Article 50), E.C.H.R., Series A, No. 330-B* (1995), para. 39 where interest was payable only in respect of the pecuniary damage awarded. See further D. Shelton, *Remedies in International Human Rights Law* (Oxford, Clarendon Press, 1999), pp. 270-2.

[645] See e.g. the Foreign Compensation (People's Republic of China) Order 1987 (U.K.), s. 10, giving effect to a Settlement Agreement of 5 June 1987: *U.K.T.S.* No. 37 (1987).

Some national court decisions have also dealt with issues of interest under international law,[646] although more often questions of interest are dealt with as part of the law of the forum.

(7) Although the trend of international decisions and practice is towards greater availability of interest as an aspect of full reparation, an injured State has no automatic entitlement to the payment of interest. The awarding of interest depends on the circumstances of each case; in particular, on whether an award of interest is necessary in order to ensure full reparation. This approach is compatible with the tradition of various legal systems as well as the practice of international tribunals.

(8) An aspect of the question of interest is the possible award of compound interest. The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest. For example, the Iran-United States Claims Tribunal has consistently denied claims for compound interest, including in cases where the claimant suffered losses through compound interest charges on indebtedness associated with the claim. In *R.J. Reynolds Tobacco Co. v. Government of the Islamic Republic of Iran*, the Tribunal failed to find …

> "any special reasons for departing from international precedents which normally do not allow the awarding of compound interest. As noted by one authority, '[t]here are few rules within the scope of the subject of damages in international law that are better settled than the one that compound interest is not allowable'... Even though the term 'all sums' could be construed to include interest and thereby to allow compound interest, the Tribunal, due to the ambiguity of the language, interprets the clause in the light of the international rule just stated, and thus excludes compound interest."[647]

Consistent with this approach the Tribunal has gone behind contractual provisions appearing to provide for compound interest, in order to prevent the claimant gaining a profit "wholly out of proportion to the possible loss that [it] might have incurred by not having the amounts due at its disposal".[648] The preponderance of authority thus continues to support the view expressed by Arbitrator Huber in the *British Claims in the Spanish Zone of Morocco* case·

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[646] See, e.g., *McKesson Corporation v. Islamic Republic of Iran*, 116 F. Supp. 2d 13 (District Court, D.C., 2000).

[647] (1984) 7 *Iran-U.S.C.T.R.* 181, at pp. 191-2, citing Whiteman, *Damages,* vol. III, p. 1997.

> "the arbitral case law in matters involving compensation of one State for another for damages suffered by the nationals of one within the territory of the other … is unanimous … in disallowing compound interest. In these circumstances, very strong and quite specific arguments would be called for to grant such interest …"[649]

The same is true for compound interest in respect of State-to-State claims.

(9) Nonetheless several authors have argued for a reconsideration of this principle, on the ground that "compound interest reasonably incurred by the injured party should be recoverable as an item of damage".[650] This view has also been supported by arbitral tribunals in some cases.[651] But given the present state of international law it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation.

(10) The actual calculation of interest on any principal sum payable by way of reparation raises a complex of issues concerning the starting date (date of breach,[652] date on which payment

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[648] *Anaconda-Iran, Inc. v. Government of the Islamic Republic of Iran,* (1986) 13 *Iran-U.S.C.T.R.* 199, at p. 235. See also G. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996) pp. 477-478.

[649] *UNRIAA*, vol. II, p. 615 (1924), at p. 650. Cf. the *Aminoil* arbitration, where the interest awarded was compounded for a period without any reason being given. This accounted for more than half of the total final award: *Government of Kuwait v. American Independent Oil Co.*, (1982) *I.L.R.*, vol. 66, p. 519, at p. 613, para. 178 (5).

[650] E.g., F.A. Mann, "Compound Interest as an Item of Damage in International Law", in *Further Studies in International Law* (Oxford, Clarendon Press, 1990) p. 377 at p. 383.

[651] See e.g. *Compañía des Desarrollo de Santa Elena SA v. Republic of Costa Rica*, I.C.S.I.D. Case No. ARB/96/1, final award of 1 February 2000, paras. 103-105.

[652] Using the date of the breach as the starting date for calculation of the interest term is problematic as there may be difficulties in determining that date, and many legal systems require a demand for payment by the claimant before interest will run. The date of formal demand was taken as the relevant date in the *Russian Indemnity* case, *UNRIAA*, vol. XI, p. 421 (1912), at p. 442, by analogy from the general position in European legal systems. In any event, failure to make a timely claim for payment is relevant in deciding whether to allow interest.

should have been made, date of claim or demand), the terminal date (date of settlement agreement or award, date of actual payment) as well as the applicable interest rate (rate current in the respondent State, in the applicant State, international lending rates). There is no uniform approach, internationally, to questions of quantification and assessment of amounts of interest payable.[653] In practice the circumstances of each case and the conduct of the parties strongly affect the outcome. There is wisdom in the Iran-United States Claims Tribunal's observation that such matters, if the parties cannot resolve them, must be left "to the exercise … of the discretion accorded to [individual tribunals] in deciding each particular case".[654] On the other hand the present unsettled state of practice makes a general provision on the calculation of interest useful. Accordingly article 38 indicates that the date from which interest is to be calculated is the date when the principal sum should have been paid. Interest runs from that date until the date the obligation to pay is fulfilled. The interest rate and mode of calculation are to be set so as to achieve the result of providing full reparation for the injury suffered as a result of the internationally wrongful act.

(11) Where a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery. A capital sum cannot be earning interest *and* notionally employed in earning profits at one and the same time. However, interest may be due on the profits which would have been earned but which have been withheld from the original owner.

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[653] See e.g. J.Y. Gotanda, *Supplemental Damages in Private International Law* (The Hague, Kluwer, 1998), p. 13. It should be noted that a number of Islamic countries, influenced by the *Shari'a*, prohibit payment of interest under their own law or even under their constitution. However, they have developed alternatives to interest in the commercial and international context. For example payment of interest is prohibited by the Iranian Constitution, Principles 43, 49, but the Guardian Council has held that this injunction does not apply to "foreign governments, institutions, companies and persons, who, according to their own principles of faith, do not consider [interest] as being prohibited …" See ibid. pp. 39-40, with references.

[654] *Islamic Republic of Iran v. United States of America (Case No. A19),* (1987) 16 *Iran-US C.T.R.* 285, at p. 290.

(12) Article 38 does not deal with post-judgment or moratory interest. It is only concerned with interest that goes to make up the amount that a court or tribunal should award, i.e. compensatory interest. The power of a court or tribunal to award post-judgement interest is a matter of its procedure.

Article 39

Contribution to the injury

> In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

Commentary

(1) Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with articles 1 and 28, but where the injured State, or the individual victim of the breach, has materially contributed to the damage by some wilful or negligent act or omission. Its focus is on situations which in national law systems are referred to as "contributory negligence", "comparative fault", "faute de la victime", etc.[655]

(2) Article 39 recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation. This is consonant with the principle that full reparation is due for the injury - but nothing more - arising in consequence of the internationally wrongful act. It is also consistent with fairness as between the responsible State and the victim of the breach.

(3) In the *LaGrand* case, the International Court recognized that the conduct of the claimant State could be relevant in determining the form and amount of reparation. There Germany had delayed in asserting that there had been a breach and in instituting proceedings. The Court noted "that Germany may be criticized for the manner in which these proceedings were filed and for their timing", and stated that it would have taken this factor, among others, into account "had Germany's submission included a claim for indemnification".[656]

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[655] See C. von Bar, *The Common European Law of Torts, Volume Two* (Munich, Beck, 2000), pp. 517-540.

[656] *LaGrand (Germany v. United States of America), Merits,* judgment of 27 June 2001, paras. 57, 116. For the relevance of delay in terms of loss of the right to invoke responsibility see article 45 (b) and commentary.

(4) The relevance of the injured State's contribution to the damage in determining the appropriate reparation is widely recognized in the literature[657] and in State practice.[658] While questions of an injured State's contribution to the damage arise most frequently in the context of compensation, the principle may also be relevant to other forms of reparation. For example, if a State-owned ship is unlawfully detained by another State and while under detention sustains damage attributable to the negligence of the captain, the responsible State may be required merely to return the ship in its damaged condition.

(5) Not every action or omission which contributes to the damage suffered is relevant for this purpose. Rather article 39 allows to be taken into account only those actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights.[659] While the notion of a negligent action or omission is not qualified, e.g., by a requirement that the negligence should have reached the level of being "serious" or "gross", the relevance of any negligence to reparation

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[657] See, e.g., B. Graefrath, "Responsibility and Damage Caused: relations between responsibility and damages", in *Recueil des cours*, vol. 185 (1984-II), p. 95; B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973), pp. 265-300.

[658] In the *Delagoa Bay Railway (Great Britain, USA/Portugal)* case, the arbitrators noted that: "All the circumstances that can be adduced against the concessionaire company and for the Portuguese Government mitigate the latter's liability and warrant ... a reduction in reparation": ((1900), Martens, *Nouveau Recueil*, 2nd series, vol. XXX, p. 329; Moore, *International Arbitrations*, vol. II, p. 1865 (1900)). In *The S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1*, p. 31, a question arose as to whether there had been any contribution to the injury suffered as a result of the ship harbouring at Kiel for some time, following refusal of passage through the Kiel Canal, before taking an alternative course. The Court implicitly acknowledged that the captain's conduct could affect the amount of compensation payable, although it held that the captain had acted reasonably in the circumstances. For other examples see C.D. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), p. 23.

[659] This terminology is drawn from Article VI (1) of the Convention on the International Liability for Damage caused by Space Objects, United Nations, *Treaty Series,* vol. 961, p. 187.

will depend upon the degree to which it has contributed to the damage as well as the other circumstances of the case.[660] The phrase "account shall be taken" indicates that the article deals with factors that are capable of affecting the form or reducing the amount of reparation in an appropriate case.

(6) The wilful or negligent action or omission which contributes to the damage may be that of the injured State or "any person or entity in relation to whom reparation is sought". This phrase is intended to cover not only the situation where a State claims on behalf of one of its nationals in the field of diplomatic protection, but also any other situation in which one State invokes the responsibility of another State in relation to conduct primarily affecting some third party. Under articles 42 and 48, a number of different situations can arise where this may be so. The underlying idea is that the position of the State seeking reparation should not be more favourable, so far as reparation in the interests of another is concerned, than it would be if the person or entity in relation to whom reparation is sought were to bring a claim individually.

Chapter III

Serious breaches of obligations under peremptory norms of general international law

(1) Chapter III of Part Two is entitled "Serious Breaches of Obligations Under Peremptory Norms of General International Law". It sets out certain consequences of specific types of breaches of international law, identified by reference to two criteria: first, they involve breaches of obligations under peremptory norms of general international law; second, the breaches concerned are in themselves serious, having regard to their scale or character. Chapter III contains two articles, the first defining its scope of application (article 40), the second spelling out the legal consequences entailed by the breaches coming within the scope of the chapter (article 41).

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[660] It is possible to envisage situations where the injury in question is entirely attributable to the conduct of the victim and not at all to that of the "responsible" State. Such situations are covered by the general requirement of proximate cause referred to in article 31, rather than by article 39. On questions of mitigation of damage see commentary to article 31, para. (11).

(2) Whether a qualitative distinction should be recognized between different breaches of international law has been the subject of a major debate.[661] The issue was underscored by the International Court of Justice in the *Barcelona Traction* case, when it said that:

> "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[662]

The Court was there concerned to contrast the position of an injured State in the context of diplomatic protection with the position of all States in respect of the breach of an obligation towards the international community as a whole. Although no such obligation was at stake in that case, the Court's statement clearly indicates that for the purposes of State responsibility certain obligations are owed to the international community as a whole, and that by reason of "the importance of the rights involved" all States have a legal interest in their protection.

(3) On a number of subsequent occasions the Court has taken the opportunity to affirm the notion of obligations to the international community as a whole, although it has been cautious in applying it. In the *East Timor* case, the Court said that "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable."[663] At the preliminary objections stage of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case,

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[661] For full bibliographies see M. Spinedi, "Crimes of States: A Bibliography", in J. Weiler, A. Cassese & M. Spinedi (eds.), *International Crimes of States* (Berlin/New York, De Gruyter, 1989), pp. 339-353 and N. Jørgensen, *The Responsibility of States for International Crimes* (Oxford, Oxford University Press, 2000) pp. 299-314.

[662] *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33. See M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford, Clarendon Press, 1997).

[663] *East Timor (Portugal v. Australia), I.C.J. Reports 1995*, p. 90, at p. 102, para. 29.

it stated that "the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*":[664] this finding contributed to its conclusion that its temporal jurisdiction over the claim was not limited to the time after which the parties became bound by the Convention.

(4) A closely related development is the recognition of the concept of peremptory norms of international law in articles 53 and 64 of the Vienna Convention on the Law of Treaties.[665] These provisions recognize the existence of substantive norms of a fundamental character, such that no derogation from them is permitted even by treaty.[666]

(5) From the first it was recognized that these developments had implications for the secondary rules of State responsibility which would need to be reflected in some way in the Articles. Initially it was thought this could be done by reference to a category of "international crimes of State", which would be contrasted with all other cases of internationally wrongful acts ("international delicts").[667] There has been, however, no development of penal consequences for States of breaches of these fundamental norms. For example, the award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms. In accordance with article 34 the function of damages is essentially compensatory.[668] Overall it remains the case, as the International Military Tribunal said in 1946, that:

> "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[669]

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[664] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996,* p. 595, at p. 616, para. 31.

[665] Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

[666] See article 26 and commentary.

[667] See *Yearbook … 1976*, vol. II Part 2, pp. 95-122, especially paras. 6-34. See also commentary to article 12, para. (5).

[668] See commentary to article 36, paragraph (4).

[669] International Military Tribunal for the Trial of the Major War Criminals, judgment of 1 October 1946, reprinted in *A.J.I.L.*, vol. 41 (1947), p. 172, at p. 221.

(6) In line with this approach, despite the trial and conviction by the Nuremburg and Tokyo Military Tribunals of individual government officials for criminal acts committed in their official capacity, neither Germany nor Japan were treated as "criminal" by the instruments creating these tribunals.[670] As to more recent international practice, a similar approach underlies the establishment of the ad hoc tribunals for Yugoslavia and Rwanda by the United Nations Security Council. Both tribunals are concerned only with the prosecution of individuals.[671] In its decision relating to a *subpoena duces tecum* in *Prosecutor v Blaskić,* the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia stated that "[u]nder present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems."[672] The Rome Statute for an International Criminal Court of 17 July 1998 likewise establishes jurisdiction over the "most serious crimes of concern to the international community as a whole", but limits this jurisdiction to "natural persons" (art. 25 (1)). The same article specifies that no provision of the Statute "relating to individual criminal responsibility shall affect the responsibility of States under international law".[673]

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[670] This despite the fact that the London Charter of 1945 specifically provided for the condemnation of a "group or organization" as "criminal", cf. Charter of the International Military Tribunal, London, United Nations, *Treaty Series*, vol. 82, p. 279, arts. 9, 10.

[671] See respectively arts. 1, 6 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, 25 May 1993 (originally published as an Annex to S/25704 and Add.1, approved by the Security Council by Resolution 827 (1993); amended 13 May 1998 by Resolution 1166 (1998) and 30 November 2000 by Resolution 1329 (2000)); and arts. 1, 7 of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for such Violations Committed in the Territory of Neighbouring States, 8 November 1994, approved by the Security Council by Resolution 955 (1994).

[672] Case IT-95-14-AR 108 *bis, Prosecutor v. Blaskić, I.L.R.,* vol. 110, p. 688 (1997), at p. 698, para. 25. Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996,* p. 595, in which neither of the parties treated the proceedings as being criminal in character. See also the commentary to article 12, para. (6).

[673] Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, art. 25 (4). See also art. 10: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

(7) Accordingly the present Articles do not recognize the existence of any distinction between State "crimes" and "delicts" for the purposes of Part One. On the other hand, it is necessary for the Articles to reflect that there are certain *consequences* flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole within the field of State responsibility. Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which the International Court has given of obligations towards the international community as a whole[674] all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became article 53 of the Vienna Convention[675] involve obligations to the international community as a whole. But there is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance - i.e., in terms of the present Articles, in being entitled to invoke the responsibility of any State in breach. Consistently with the difference in their focus, it is appropriate to reflect the consequences of the two concepts in two distinct ways. First, serious

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[674] According to the International Court of Justice, obligations *erga omnes* "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination": *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970,* p. 3, at p. 32, para. 34. See also *East Timor (Portugal v. Australia), I.C.J. Reports 1995,* p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996,* p. 226, at p. 258, para. 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, I.C.J. Reports 1996,* p. 595, at pp. 615-616, paras. 31-32.

[675] The International Law Commission gave the following examples of treaties which would violate the article due to conflict with a peremptory norm of general international law, or a rule of *jus cogens:* "(a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (b) a treaty contemplating the performance of any other act criminal under international law, and (c) a treaty contemplating or conniving at the commission of such acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to cooperate … treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples": *Yearbook ... 1966,* vol. II, p. 248.

breaches of obligations arising under peremptory norms of general international law can attract additional consequences, not only for the responsible State but for all other States. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole. The first of these propositions is the concern of the present chapter; the second is dealt with in article 48.

Article 40

Application of this chapter

> 1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
>
> 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Commentary

(1) Article 40 serves to define the scope of the breaches covered by the chapter. It establishes two criteria in order to distinguish "serious breaches of obligations under peremptory norms of general international law" from other types of breaches. The first relates to the character of the obligation breached, which must derive from a peremptory norm of general international law. The second qualifies the intensity of the breach, which must have been serious in nature. Chapter III only applies to those violations of international law that fulfil both criteria.

(2) The first criterion relates to the character of the obligation breached. In order to give rise to the application of this chapter, a breach must concern an obligation arising under a peremptory norm of general international law. In accordance with article 53 of the Vienna Convention on the Law of Treaties,[676] a peremptory norm of general international law is one which is …

> "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

The concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal doctrine.[677]

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[676] Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

(3) It is not appropriate to set out examples of the peremptory norms referred to in the text of article 40 itself, any more than it was in the text of article 53 of the Vienna Convention. The obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values.

(4) Among these prohibitions, it is generally agreed that the prohibition of aggression is to be regarded as peremptory. This is supported, for example, by the Commission's commentary to what was to become article 53,[678] uncontradicted statements by Governments in the course of the Vienna Conference,[679] the submissions of both parties in *Military and Paramilitary Activities* and the Court's own position in that case.[680] There also seems to be widespread agreement with other examples listed in the Commission's commentary to article 53: viz., the prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid. These practices have been prohibited in widely ratified international treaties and conventions admitting of no exception. There was general agreement among governments as to the peremptory character of these prohibitions at the Vienna Conference. As to the peremptory character of the prohibition against genocide, this is supported by a number of decisions by national and international courts.[681]

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[677] For further discussion of the requirements for identification of a norm as peremptory see commentary to article 26, para. (5), with selected references to the case-law and literature.

[678] *Yearbook ... 1966*, vol. II, p. 247.

[679] In the course of the Vienna conference, a number of Governments characterized as peremptory the prohibitions against aggression and the illegal use of force: see *United Nations Conference on the Law of Treaties, First Session,* A/CONF. 39/11, pp. 294, 296-7, 300, 301, 302, 303, 304, 306, 307, 311, 312, 318, 320, 322, 323-4, 326.

[680] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986,* p. 14, at pp. 100-1, para. 190. See also President Nagendra Singh, ibid., at p. 153.

[681] See, for example, the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, I.C.J. Reports 1993,* p. 325, at pp. 439-440; *Counter-Claims, I.C.J. Reports 1997,* p. 243; the District Court of Jerusalem in *Attorney-General of the Government of Israel v. Eichmann,* (1961) *I.L.R.*, vol. 36, p. 5.

(5) Although not specifically listed in the Commission's commentary to article 53 of the Vienna Convention, the peremptory character of certain other norms seems also to be generally accepted. This applies to the prohibition against torture as defined in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.[682] The peremptory character of this prohibition has been confirmed by decisions of international and national bodies.[683] In the light of the International Court's description of the basic rules of international humanitarian law applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory.[684] Finally, the obligation to respect the right of self-determination deserves to be mentioned. As the International Court noted in the *East Timor* case, "[t]he principle of self-determination ... is one of the essential principles of contemporary international law", which gives rise to an obligation to the international community as a whole to permit and respect its exercise.[685]

(6) It should be stressed that the examples given above may not be exhaustive. In addition, article 64 of the Vienna Convention contemplates that new peremptory norms of general international law may come into existence through the processes of acceptance and recognition by the international community of States as a whole, as referred to in article 53. The examples given here are thus without prejudice to existing or developing rules of international law which fulfil the criteria for peremptory norms under article 53.

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[682] *United Nations, Treaty Series*, vol. 1465, p. 112.

[683] Cf. the U.S. Court of Appeals, 2nd Circuit, in *Siderman de Blake v. Argentina,* (1992) *I.L.R.*, vol. 103, p. 455, at p. 471; the United Kingdom Court of Appeal in *Al Adsani v. Government of Kuwait,* (1996) *I.L.R.*, vol. 107, p. 536 at pp. 540-541; the United Kingdom House of Lords in *R. v. Bow Street Metropolitan Magistrate, ex parte Pinochet Ugarte (No. 3),* [1999] 2 W.L.R. 827, at pp. 841, 881. Cf. the U.S. Court of Appeals, 2nd Circuit in *Filartiga v. Pena-Irala,* (1980), 630 F.2d 876, *I.L.R.*, vol. 77, p. 169, at pp. 177-179.

[684] *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996,* p. 226, at p. 257, para. 79.

[685] *East Timor (Portugal v. Australia), I.C.J. Reports 1995,* p. 90, at p. 102, para. 29. See Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the *United Nations*, G.A. Res. 2625 (XXV) of 24 October 1970, fifth principle.

(7) Apart from its limited scope in terms of the comparatively small number of norms which qualify as peremptory, article 40 applies a further limitation for the purposes of the chapter, viz. that the breach should itself have been "serious". A "serious" breach is defined in paragraph 2 as one which involves "a gross or systematic failure by the responsible State to fulfil the obligation" in question. The word "serious" signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach and it is not intended to suggest that any violation of these obligations is not serious or is somehow excusable. But relatively less serious cases of breach of peremptory norms can be envisaged, and it is necessary to limit the scope of this chapter to the more serious or systematic breaches. Some such limitation is supported by State practice. For example, when reacting against breaches of international law, States have often stressed their systematic, gross, or egregious nature. Similarly, international complaint procedures, for example in the field of human rights, attach different consequences to systematic breaches, e.g. in terms of the non-applicability of the rule of exhaustion of local remedies.[686]

(8) To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations, and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.[687]

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[686] See *Ireland v. United Kingdom, E.C.H.R., Series A, No. 25* (1978), para. 159; cf. e.g. the procedure established under ECOSOC resolution 1503 (XXVIII), which requires a "consistent pattern of gross violations of human rights".

[687] In 1976 the Commission proposed the following examples as cases denominated as "international crimes":

> "(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
>
> (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(9) Article 40 does not lay down any procedure for determining whether or not a serious breach has been committed. It is not the function of the Articles to establish new institutional procedures for dealing with individual cases, whether they arise under chapter III of Part Two or otherwise. Moreover the serious breaches dealt with in this chapter are likely to be addressed by the competent international organizations including the Security Council and the General Assembly. In the case of aggression, the Security Council is given a specific role by the Charter.

Article 41

Particular consequences of a serious breach of an obligation under this chapter

> 1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
>
> 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
>
> 3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

Commentary

(1) Article 41 sets out the particular consequences of breaches of the kind and gravity referred to in article 40. It consists of three paragraphs. The first two prescribe special legal obligations of States faced with the commission of "serious breaches" in the sense of article 40, the third takes the form of a saving clause.

(2) Pursuant to paragraph 1 of article 41, States are under a positive duty to cooperate in order to bring to an end serious breaches in the sense of article 40. Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what

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(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas."

(*Yearbook* ... *1976*, vol. II, Part Two, pp. 95-96).

form this cooperation should take. Cooperation could be organized in the framework of a competent international organization, in particular the United Nations. However, paragraph 1 also envisages the possibility of non-institutionalized cooperation.

(3) Neither does paragraph 1 prescribe what measures States should take in order to bring an end to serious breaches in the sense of article 40. Such cooperation must be through lawful means, the choice of which will depend on the circumstances of the given situation.
It is, however, made clear that the obligation to cooperate applies to States whether or not they are individually affected by the serious breach. What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. But in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy. Paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response to the serious breaches referred to in article 40.

(4) Pursuant to paragraph 2 of article 41, States are under a duty of abstention, which comprises two obligations, first, not to recognize as lawful situations created by serious breaches in the sense of article 40, and, second, not to render aid or assistance in maintaining that situation.

(5) The first of these two obligations refers to the obligation of collective non-recognition by the international community as a whole of the legality of situations resulting directly from serious breaches in the sense of article 40.[688] The obligation applies to "situations" created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples. It not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.

(6) The existence of an obligation of non-recognition in response to serious breaches of obligations arising under peremptory norms already finds support in international practice and in

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[688] This has been described as "an essential legal weapon in the fight against grave breaches of the basic rules of international law": C. Tomuschat, "International Crimes by States: An Endangered Species?", in K. Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (The Hague, Nijhoff, 1998), p. 253 at p. 259.

decisions of the International Court of Justice. The principle that territorial acquisitions brought about by the use of force are not valid and must not be recognized found a clear expression during the Manchurian crisis of 1931-1932, when the Secretary of State, Henry Stimson, declared that the United States of America - joined by a large majority of members of the League of Nations - would not …

> "admit the legality of any situation de facto nor ... recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the ... sovereignty, the independence or the territorial and administrative integrity of the Republic of China, ... [nor] recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928."[689]

The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations affirms this principle by stating unequivocally that States shall not recognize as legal any acquisition of territory brought about by the use of force.[690] As the International Court of Justice held in *Military and Paramilitary Activities*, the unanimous consent of States to this declaration "may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves."[691]

(7) An example of the practice of non-recognition of acts in breach of peremptory norms is provided by the reaction of the Security Council to the Iraqi invasion of Kuwait in 1990. Following the Iraqi declaration of a "comprehensive and eternal merger" with Kuwait, the Security Council in Resolution 662 (1990), decided that the annexation had "no legal validity, and is considered null and void", and called upon all States, international organizations and

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[689] Secretary of State's note to the Chinese and Japanese Governments, in Hackworth, Digest, vol. I, p. 334; endorsed by Assembly Resolutions of 11 March 1932, *League of Nations Official Journal*, March 1932, Special Supplement No. 101, p. 87. For a review of earlier practice relating to collective non-recognition see J. Dugard, *Recognition and the United Nations* (Cambridge, Grotius, 1987), pp. 24-27.

[690] G.A. Res. 2625 (XXV), first principle, para. 10.

[691] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986*, p. 14, at p. 100, para. 188.

specialized agencies not to recognize that annexation and to refrain from any action or dealing that might be interpreted as a recognition of it, whether direct or indirect. In fact no State recognized the legality of the purported annexation, the effects of which were subsequently reversed.

(8) As regards the denial by a State of the right of self-determination of peoples, the International Court's advisory opinion on *Namibia (South West Africa)* is similarly clear in calling for a non-recognition of the situation.[692] The same obligations are reflected in Security Council and General Assembly resolutions concerning the situation in Rhodesia[693] and the Bantustans in South Africa.[694] These examples reflect the principle that where a serious breach in the sense of article 40 has resulted in a situation that might otherwise call for recognition, this has nonetheless to be withheld. Collective non-recognition would seem to be a prerequisite for any concerted community response against such breaches and marks the minimum necessary response by States to the serious breaches referred to in article 40.

(9) Under article 41 (2), no State shall recognize the situation created by the serious breach as lawful. This obligation applies to all States, including the responsible State. There have been cases where the responsible State has sought to consolidate the situation it has created by its own "recognition". Evidently the responsible State is under an obligation not to recognize or sustain the unlawful situation arising from the breach. Similar considerations apply even to the injured State: since the breach by definition concerns the international community as a whole, waiver or recognition induced from the injured State by the responsible State cannot preclude the

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[692] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 16, at p. 56, para. 126, where the Court held that "the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law".

[693] Cf. S.C. Res. 216 (1965).

[694] See e.g. G.A. Res. 31/6A (1976), endorsed by S.C. Res. 402 (1976); G.A. Res. 32/105N (1977); G.A. Res. 34/93G (1979); see also the statements issued by the respective presidents of the United Nations Security Council in reaction to the "creation" of Venda and Ciskei: S/13549, 21 September 1979; S/14794, 15 December 1981.

international community interest in ensuring a just and appropriate settlement. These conclusions are consistent with article 30 on cessation and are reinforced by the peremptory character of the norms in question.[695]

(10) The consequences of the obligation of non-recognition are, however, not unqualified. In the *Namibia (South West Africa)* advisory opinion the Court, despite holding that the illegality of the situation was opposable *erga omnes* and could not be recognized as lawful even by States not members of the United Nations, said that:

> "the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory."[696]

Both the principle of non-recognition and this qualification to it have been applied, for example, by the European Court of Human Rights.[697]

(11) The second obligation contained in paragraph 2 prohibits States from rendering aid or assistance in maintaining the situation created by a serious breach in the sense of article 40. This goes beyond the provisions dealing with aid or assistance in the commission of an internationally wrongful act, which are covered by article 16. It deals with conduct "after the fact" which assists the responsible State in maintaining a situation "opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law".[698]

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[695] See also the commentary to article 20, paragraph (7) and the commentary to article 45, paragraph (4).

[696] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 16, at p. 56, para. 125.

[697] *Loizidou v. Turkey, Merits, E.C.H.R. Reports* 1996-VI, p. 2216; *Cyprus v. Turkey* (Application no. 25781/94), judgement of 10 May 2001, paras. 89-98.

[698] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 16, at p. 56, para. 126.

It extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach, and it applies whether or not the breach itself is a continuing one. As to the elements of "aid or assistance", article 41 is to be read in connection with article 16. In particular, the concept of aid or assistance in article 16 presupposes that the State has "knowledge of the circumstances of the internationally wrongful act". There is no need to mention such a requirement in article 41 (2) as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State.

(12) In some respects, the prohibition contained in paragraph 2 may be seen as a logical extension of the duty of non-recognition. However, it has a separate scope of application insofar as actions are concerned which would not imply recognition of the situation created by serious breaches in the sense of article 40. This separate existence is confirmed, for example, in the Security Council's resolutions prohibiting any aid or assistance in maintaining the illegal apartheid regime in South Africa or Portuguese colonial rule.[699] Just as in the case of the duty of non-recognition, these resolutions would seem to express a general idea applicable to all situations created by serious breaches in the sense of article 40.

(13) Pursuant to paragraph 3, article 41 is without prejudice to the other consequences elaborated in Part Two and to possible further consequences that a serious breach in the sense of article 40 may entail. The purpose of this paragraph is twofold. First, it makes it clear that a serious breach in the sense of article 40 entails the legal consequences stipulated for all breaches in chapter I and II of Part Two. Consequently, a serious breach in the sense of article 40 gives rise to an obligation, on behalf of the responsible State, to cease the wrongful act, to continue performance and, if appropriate, to give guarantees and assurances of non-repetition. By the same token, it entails a duty to make reparation in conformity with the rules set out in chapter II of this Part. The incidence of these obligations will no doubt be affected by the gravity of the breach in question, but this is allowed for in the actual language of the relevant articles.

(14) Secondly, paragraph 3 allows for such further consequences of a serious breach as may be provided for by international law. This may be done by the individual primary rule, as in the case of the prohibition of aggression. Paragraph 3 accordingly allows that international law may recognize additional legal consequences flowing from the commission of a serious breach in the

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[699] Cf. e.g. S.C. Res. 218 (1965) on the Portuguese colonies and S.C. Res. 418 (1977) and 569 (1985) on South Africa.

sense of article 40. The fact that such further consequences are not expressly referred to in chapter III does not prejudice their recognition in present-day international law, or their further development. In addition, paragraph 3 reflects the conviction that the legal regime of serious breaches is itself in a state of development. By setting out certain basic legal consequences of serious breaches in the sense of article 40, article 41 does not intend to preclude the future development of a more elaborate regime of consequences entailed by such breaches.

PART THREE

THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Part Three deals with the implementation of State responsibility, i.e. with giving effect to the obligations of cessation and reparation which arise for a responsible State under Part Two by virtue of its commission of an internationally wrongful act. Although State responsibility arises under international law independently of its invocation by another State, it is still necessary to specify what other States faced with a breach of an international obligation may do, what action they may take in order to secure the performance of the obligations of cessation and reparation on the part of the responsible State. This, sometimes referred to as the *mise-en-oeuvre* of State responsibility, is the subject matter of Part Three. Part Three consists of two chapters. Chapter I deals with the invocation of State responsibility by other States and with certain associated questions. Chapter II deals with countermeasures taken in order to induce the responsible State to cease the conduct in question and to provide reparation.

Chapter I

Invocation of the responsibility of a State

(1) Part One of the Articles identifies the internationally wrongful act of a State generally in terms of the breach of any international obligation of that State. Part Two defines the consequences of internationally wrongful acts in the field of responsibility as obligations of the responsible State, not as rights of any other State person or entity. Part Three is concerned with the implementation of State responsibility, i.e., with the entitlement of other States to invoke the international responsibility of the responsible State and with certain modalities of such invocation. The rights that other persons or entities may have arising from a breach of an international obligation are preserved by article 33 (2).

(2) Central to the invocation of responsibility is the concept of the injured State. This is the State whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act. This concept is introduced in article 42 and various consequences are drawn from it in other articles of this chapter. In keeping with the broad range of international obligations covered by the Articles, it is necessary to recognize that a broader range of States may have a legal interest in invoking responsibility and ensuring compliance with the obligation in question. Indeed in certain situations, all States may have such an interest, even though none of them is individually or specially affected by the breach.[700] This possibility is recognized in article 48. Articles 42 and 48 are couched in terms of the entitlement of States to invoke the responsibility of another State. They seek to avoid problems arising from the use of possibly misleading terms such as "direct" versus "indirect" injury or "objective" versus "subjective" rights.

(3) Although article 42 is drafted in the singular ("an injured State"), more than one State may be injured by an internationally wrongful act and be entitled to invoke responsibility as an injured State. This is made clear by article 46. Nor are articles 42 and 48 mutually exclusive. Situations may well arise in which one State is "injured" in the sense of article 42, and other States are entitled to invoke responsibility under article 48.

(4) Chapter I also deals with a number of related questions: the requirement of notice if a State wishes to invoke the responsibility of another (article 43), certain aspects of the admissibility of claims (article 44), loss of the right to invoke responsibility (article 45), and cases where the responsibility of more than one State may be invoked in relation to the same internationally wrongful act (article 47).

(5) Reference must also be made to article 55, which makes clear the residual character of the Articles. In addition to giving rise to international obligations for States, special rules may also determine which other State or States are entitled to invoke the international responsibility arising from their breach, and what remedies they may seek. This was true, for example, of article 396 of

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[700] Cf. the International Court of Justice's statement that "all States can be held to have a legal interest" as concerns breaches of obligations *erga omnes*: *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33, cited in commentary to Part Two, chapter III, para. (2).

the Treaty of Versailles of 1919, which was the subject of the decision in *The S.S. Wimbledon.*[701] It is also true of article 33 of the European Convention of Human Rights. It will be a matter of interpretation in each case whether such provisions are intended to be exclusive, i.e. to apply as a *lex specialis*.

Article 42

Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(*a*) That State individually; or

(*b*) A group of States including that State, or the international community as a whole, and the breach of the obligation:

- (i) Specially affects that State; or
- (ii) Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Commentary

(1) Article 42 provides that the implementation of State responsibility is in the first place an entitlement of the "injured State". It defines this term in a relatively narrow way, drawing a distinction between injury to an individual State or possibly a small number of States and the legal interests of several or all States in certain obligations established in the collective interest. The latter are dealt with in article 48.

(2) This chapter is expressed in terms of the invocation by a State of the responsibility of another State. For this purpose, invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these Articles, protest as such is not an invocation of responsibility; it has a variety of

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[701] *1923, P.C.I.J., Series A, No. 1.* Four States there invoked the responsibility of Germany, at least one of which, Japan, had no specific interest in the voyage of the *S.S. Wimbledon.*

forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal,[702] or even the taking of countermeasures. In order to take such steps, i.e. to invoke responsibility in the sense of the Articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. a right of action specifically conferred by a treaty,[703] or it must be considered an injured State. The purpose of article 42 is to define this latter category.

(3) A State which is injured in the sense of article 42 is entitled to resort to all means of redress contemplated in the Articles. It can invoke the appropriate responsibility pursuant to Part Two. It may also - as is clear from the opening phrase of article 49 - resort to countermeasures in accordance with the rules laid down in chapter II of this Part. The situation of an injured State should be distinguished from that of any other State which may be entitled to invoke responsibility, e.g. under article 48 which deals with the entitlement to invoke responsibility in some shared general interest. This distinction is clarified by the opening phrase of article 42, "A State is entitled as an injured State to invoke the responsibility ...".

(4) The definition in article 42 is closely modelled on article 60 of the Vienna Convention on the Law of Treaties,[704] although the scope and purpose of the two provisions is different. Article 42 is concerned with any breach of an international obligation of whatever character,

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[702] An analogous distinction is drawn by art. 27 (2) of the Washington Convention of 1965 (Convention on the Settlement of Investment Disputes between States and Nationals of Other States, United Nations, *Treaty Series,* vol. 575, p. 159), which distinguishes between the bringing of an international claim in the field of diplomatic protection and "informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute".

[703] In relation to article 42, such a treaty right could be considered a *lex specialis*: see article 55 and commentary.

[704] Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

whereas article 60 is concerned with breach of treaties. Moreover article 60 is concerned exclusively with the right of a State party to a treaty to invoke a material breach of that treaty by another party as grounds for its suspension or termination. It is not concerned with the question of responsibility for breach of the treaty.[705] This is why article 60 is restricted to "material" breaches of treaties. Only a material breach justifies termination or suspension of the treaty, whereas in the context of State responsibility any breach of a treaty gives rise to responsibility irrespective of its gravity. Despite these differences, the analogy with article 60 is justified. Article 60 seeks to identify the States parties to a treaty which are entitled to respond individually and in their own right to a material breach by terminating or suspending it. In the case of a bilateral treaty the right can only be that of the other State party, but in the case of a multilateral treaty article 60 (2) does not allow every other State to terminate or suspend the treaty for material breach. The other State must be specially affected by the breach, or at least individually affected in that the breach necessarily undermines or destroys the basis for its own further performance of the treaty.

(5) In parallel with the cases envisaged in article 60 of the Vienna Convention on the Law of Treaties, three cases are identified in article 42. In the first case, in order to invoke the responsibility of another State as an injured State, a State must have an individual right to the performance of an obligation, in the way that a State party to a bilateral treaty has vis-à-vis the other State party (subparagraph (a)). Secondly, a State may be specially affected by the breach of an obligation to which it is a party, even though it cannot be said that the obligation is owed to it individually (subparagraph (b) (i)). Thirdly, it may be the case that performance of the obligation by the responsible State is a necessary condition of its performance by all the other States (subparagraph (b) (ii)); this is the so-called "integral" or "interdependent" obligation.[706] In each of these cases, the possible suspension or termination of the obligation or of its performance by the injured State may be of little value to it as a remedy. Its primary interest may be in the restoration of the legal relationship by cessation and reparation.

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[705] Cf., Vienna Convention, ibid., art. 73.

[706] The notion of "integral" obligations was developed by Fitzmaurice as Special Rapporteur on the Law of Treaties: see *Yearbook ... 1957*, vol. II, p. 54. The term has sometimes given rise to confusion, being used to refer to human rights or environmental obligations which are not owed on an "all or nothing" basis. The term "interdependent obligations" may be more appropriate.

(6) Pursuant to subparagraph (a) of article 42, a State is "injured" if the obligation breached was owed to it individually. The expression "individually" indicates that in the circumstances, performance of the obligation was owed to that State. This will necessarily be true of an obligation arising under a bilateral treaty between the two States parties to it, but it will also be true in other cases, e.g. of a unilateral commitment made by one State to another. It may be the case under a rule of general international law: thus, for example, rules concerning the non-navigational uses of an international river which may give rise to individual obligations as between one riparian State and another. Or it may be true under a multilateral treaty where particular performance is incumbent under the treaty as between one State party and another. For example, the obligation of the receiving State under article 22 of the Vienna Convention on Diplomatic Relations[707] to protect the premises of a mission is owed to the sending State. Such cases are to be contrasted with situations where performance of the obligation is owed generally to the parties to the treaty at the same time and is not differentiated or individualized. It will be a matter for the interpretation and application of the primary rule to determine into which of the categories an obligation comes. The following discussion is illustrative only.

(7) An obvious example of cases coming within the scope of subparagraph (a) is a bilateral treaty relationship. If one State violates an obligation the performance of which is owed specifically to another State, the latter is an "injured State" in the sense of article 42. Other examples include binding unilateral acts by which one State assumes an obligation vis-à-vis another State; or the case of a treaty establishing obligations owed to a third State not party to the treaty.[708] If it is established that the beneficiaries of the promise or the stipulation in favour of a third State were intended to acquire actual rights to performance of the obligation in question, they will be injured by its breach. Another example is a binding judgment of an international court or tribunal imposing obligations on one State party to the litigation for the benefit of the other party.[709]

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[707] Vienna Convention on Diplomatic Relations, United Nations, *Treaty Series*, vol. 500, p. 95.

[708] Cf. Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 36.

[709] See e.g. art. 59 of the Statute of the International Court of Justice.

environment, those coastal States parties should be considered as injured by the breach. Like article 60 (2) (b) of the Vienna Convention, subparagraph (b) (i) does not define the nature or extent of the special impact that a State must have sustained in order to be considered "injured". This will have to be assessed on a case by case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. For a State to be considered injured it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.

(13) In contrast, subparagraph (b) (ii) deals with a special category of obligations, breach of which must be considered as affecting per se every other State to which the obligation is owed. Article 60 (2) (c) of the Vienna Convention on the Law of Treaties recognizes an analogous category of treaties, viz., those "of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations". Examples include a disarmament treaty,[712] a nuclear free zone treaty, or any other treaty where each parties' performance is effectively conditioned upon and requires the performance of each of the others. Under article 60 (2) (c), any State party to such a treaty may terminate or suspend it in its relations not merely with the responsible State but generally in its relations with all the other parties.

(14) Essentially the same considerations apply to obligations of this character for the purposes of State responsibility. The other States parties may have no interest in termination or suspension of such obligations as distinct from continued performance, and they must all be considered as individually entitled to react to a breach. This is so whether or not any one of them is particularly affected; indeed they may all be equally affected, and none may have suffered quantifiable damage for the purposes of article 36. They may nonetheless have a strong interest in cessation and in other aspects of reparation, in particular restitution. For example, if one State party to the Antarctic Treaty claims sovereignty over an unclaimed area of Antarctica contrary to article 4 of that Treaty, the other States parties should be considered as injured thereby and as entitled to seek cessation, restitution (in the form of the annulment of the claim) and assurances of non-repetition in accordance with Part Two.

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[712] The example given in the Commission's commentary to what became art. 60: *Yearbook ... 1966*, vol. II, p. 255, para. (8).

(15) The Articles deal with obligations arising under international law from whatever source and are not confined to treaty obligations. In practice interdependent obligations covered by subparagraph (b) (ii) will usually arise under treaties establishing particular regimes. Even under such treaties it may not be the case that just any breach of the obligation has the effect of undermining the performance of all the other States involved, and it is desirable that this subparagraph be narrow in its scope. Accordingly a State is only considered injured under subparagraph (b) (ii) if the breach is of such a character as radically to affect the enjoyment of the rights or the performance of the obligations of all the other States to which the obligation is owed.

Article 43

Notice of claim by an injured State

> 1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.
>
> 2. The injured State may specify in particular:
>
> (*a*) The conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;
>
> (*b*) What form reparation should take in accordance with the provisions of Part Two.

Commentary

(1) Article 43 concerns the modalities to be observed by an injured State in invoking the responsibility of another State. The article applies to the injured State as defined in article 42, but States invoking responsibility under article 48 must also comply with its requirements.[713]

(2) Although State responsibility arises by operation of law on the commission of an internationally wrongful act by a State, in practice it is necessary for an injured State and/or other interested State(s) to respond, if they wish to seek cessation or reparation. Responses can take a variety of forms, from an unofficial and confidential reminder of the need to fulfil the obligation through formal protest, consultations, etc. Moreover the failure of an injured State which has notice of a breach to respond may have legal consequences, including even the eventual loss of the right to invoke responsibility by waiver or acquiescence: this is dealt with in article 45.

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[713] See article 48 (3) and commentary.

(3) Article 43 requires an injured State which wishes to invoke the responsibility of another State to give notice of its claim to that State. It is analogous to article 65 of the Vienna Convention on the Law of Treaties.[714] Notice under article 43 need not be in writing, nor is it a condition for the operation of the obligation to provide reparation. Moreover, the requirement of notification of the claim does not imply that the normal consequence of the non-performance of an international obligation is the lodging of a statement of claim. Nonetheless an injured or interested State is entitled to respond to the breach and the first step should be to call the attention of the responsible State to the situation, and to call on it to take appropriate steps to cease the breach and to provide redress.

(4) It is not the function of the Articles to specify in detail the form which an invocation of responsibility should take. In practice claims of responsibility are raised at different levels of government, depending on their seriousness and on the general relations between the States concerned. In *Certain Phosphate Lands in Nauru*, Australia argued that Nauru's claim was inadmissible because it had "not been submitted within a reasonable time".[715] The Court referred to the fact that the claim had been raised, and not settled, prior to Nauru's independence in 1968, and to press reports that the claim had been mentioned by the new President of Nauru in his independence day speech, as well as, inferentially, in subsequent correspondence and discussions with Australian Ministers. However the Court also noted that …

> "It was only on 6 October 1983 that the President of Nauru wrote to the Prime Minister of Australia requesting him to 'seek a sympathetic reconsideration of Nauru's position'."[716]

The Court summarized the communications between the parties as follows:

> "The Court … takes note of the fact that Nauru was officially informed, at the latest by letter of 4 February 1969, of the position of Australia on the subject of rehabilitation of the phosphate lands worked out before 1 July 1967. Nauru took issue with that position in writing only on 6 October 1983. In the meantime, however, as stated by

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[714] Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331.

[715] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 240, at p. 253, para. 31.

[716] Ibid., at p. 254, para. 35.

> Nauru and not contradicted by Australia, the question had on two occasions been raised by the President of Nauru with the competent Australian authorities. The Court considers that, given the nature of relations between Australia and Nauru, as well as the steps thus taken, Nauru's Application was not rendered inadmissible by passage of time."[717]

In the circumstances it was sufficient that the respondent State was aware of the claim as a result of communications from the claimant, even if the evidence of those communications took the form of press reports of speeches or meetings rather than of formal diplomatic correspondence.

(5) When giving notice of a claim, an injured or interested State will normally specify what conduct in its view is required of the responsible State by way of cessation of any continuing wrongful act, and what form any reparation should take. Thus Subparagraph 2 (a) provides that the injured State may indicate to the responsible State what should be done in order to cease the wrongful act, if it is continuing. This indication is not, as such, binding on the responsible State. The injured State can only require the responsible State to comply with its obligations, and the legal consequences of an internationally wrongful act are not for the injured State to stipulate or define. But it may be helpful to the responsible State to know what would satisfy the injured State; this may facilitate the resolution of the dispute.

(6) Subparagraph 2 (b) deals with the question of the election of the form of reparation by the injured State. In general, an injured State is entitled to elect as between the available forms of reparation. Thus it may prefer compensation to the possibility of restitution, as Germany did in the *Factory at Chorzów* case,[718] or as Finland eventually chose to do in its settlement of the *Passage through the Great Belt* case.[719] Or it may content itself with declaratory relief,

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[717] Ibid., at pp. 254-255, para. 36.

[718] As the Permanent Court noted in the *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9,* at p. 17, by that stage of the dispute, Germany was no longer seeking on behalf of the German companies concerned the return of the factory in question or of its contents.

[719] In the *Passage through the Great Belt (Finland v. Denmark), Provisional Measures, I.C.J. Reports 1991*, p. 12, the International Court did not accept Denmark's argument as to the impossibility of restitution if, on the merits, it was found that the construction of the bridge across the Great Belt would result in a violation of Denmark's international obligations. For the terms of the eventual settlement see M. Koskenniemi, "L'affaire du passage par le Grand-Belt", *A.F.D.I.*, vol. XXXVIII (1992), p. 905, at p. 940.

generally or in relation to a particular aspect of its claim. On the other hand, there are cases where a State may not, as it were, pocket compensation and walk away from an unresolved situation, for example one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. In particular, in so far as there are continuing obligations the performance of which are not simply matters for the two States concerned, those States may not be able to resolve the situation by a settlement, just as an injured State may not be able on its own to absolve the responsible State from its continuing obligations to a larger group of States or to the international community as a whole.

(7) In light of these limitations on the capacity of the injured State to elect the preferred form of reparation, article 43 does not set forth the right of election in an absolute form. Instead it provides guidance to an injured State as to what sort of information it may include in its notification of the claim or in subsequent communications.

Article 44

Admissibility of claims

The responsibility of a State may not be invoked if:

(*a*) The claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(*b*) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Commentary

(1) The present Articles are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals. Rather they define the conditions for establishing the international responsibility of a State and for the invocation of that responsibility by another State or States. Thus it is not the function of the Articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as litispendence or election as they may affect the jurisdiction of

one international tribunal vis-à-vis another.[720] By contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place. Two such matters are dealt with in article 44: the requirements of nationality of claims and exhaustion of local remedies.

(2) Subparagraph (a) provides that the responsibility of a State may not be invoked other than in accordance with any applicable rule relating to the nationality of claims. As the Permanent Court said in the *Mavrommatis Palestine Concessions* case ...

> "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels."[721]

Paragraph (a) does not attempt a detailed elaboration of the nationality of claims rule or of the exceptions to it. Rather, it makes it clear that the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable.[722]

(3) Subparagraph (b) provides that when the claim is one to which the rule of exhaustion of local remedies applies, the claim is inadmissible if any available and effective local remedy has not been exhausted. The paragraph is formulated in general terms in order to cover any case to which the exhaustion of local remedies rule applies, whether under treaty or general international law, and in spheres not necessarily limited to diplomatic protection.

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[720] For discussion of the range of considerations affecting jurisdiction and admissibility of international claims before courts see G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale* (Paris, Pedone, 1967); G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, Grotius, 1986), vol. II, pp. 427-575; S. Rosenne, *The Law and Practice of the International Court, 1920-1996* (3rd edn.) (The Hague, Nijhoff, 1997), vol. II, "Jurisdiction".

[721] *1924, P.C.I.J., Series A, No. 2,* p. 12.

[722] Questions of nationality of claims will be dealt with in detail in the International Law Commission's work on diplomatic protection. See first report of the Special Rapporteur for the topic "Diplomatic protection", A/CN.4/506.

(4) The local remedies rule was described by a Chamber of the Court in the *ELSI* case as "an important principle of customary international law".[723] In the context of a claim brought on behalf of a corporation of the claimant State, the Chamber defined the rule succinctly in the following terms:

> "for an international claim [sc. on behalf of individual nationals or corporations] to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success".[724]

The Chamber thus treated the exhaustion of local remedies as being distinct, in principle, from "the merits of the case".[725]

(5) Only those local remedies which are "available and effective" have to be exhausted before invoking the responsibility of a State. The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the

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[723] *Elettronica Sicula S.p.A. (ELSI), I.C.J. Reports 1989*, p. 15, at p. 42, para. 50. See also *Interhandel, Preliminary Objections, I.C.J. Reports 1959*, p. 6, at p. 27. On the exhaustion of local remedies rule generally, see e.g. C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990); J. Chappez, *La règle de l'épuisement des voies de recours internes* (Paris, Pedone, 1972); K. Doehring, "Local Remedies, Exhaustion of", *in Encyclopedia of Public International Law,* (R. Bernhardt, ed.) (Amsterdam, North Holland, 1995), vol. 3, pp. 238-242; G. Perrin, "La naissance de la responsabilité internationale et l'épuisement des voies de recours internes dans le projet d'articles de la C.D.I.", *Festschrift für R. Bindschedler* (Bern, Stämpfli, 1980), p. 271. On the exhaustion of local remedies rule in relation to violations of human rights obligations, see e.g. A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge, Cambridge University Press, 1983); E. Wyler, *L'illicite et la condition des personnes privées* (Paris, Pedone, 1995), pp. 65-89.

[724] *Elettronica Sicula, I.C.J. Reports 1989*, p. 15, at p. 46, para. 59.

[725] Ibid., at p. 48, para. 63.

local court would have to apply can lead only to the rejection of any appeal. Beyond this, article 44 (b) does not attempt to spell out comprehensively the scope and content of the exhaustion of local remedies rule, leaving this to the applicable rules of international law.[726]

Article 45

Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(*a*) The injured State has validly waived the claim;

(*b*) The injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Commentary

(1) Article 45 is analogous to article 45 of the Vienna Convention on the Law of Treaties concerning loss of the right to invoke a ground for invalidating or terminating a treaty. The article deals with two situations in which the right of an injured State or other States concerned to invoke the responsibility of a wrongdoing State may be lost: waiver and acquiescence in the lapse of the claim. In this regard the position of an injured State as referred to in article 42 and other States concerned with a breach needs to be distinguished. A valid waiver or settlement of the responsibility dispute between the responsible State and the injured State, or, if there is more than one, all the injured States, may preclude any claim for reparation. Positions taken by individual States referred to in article 48 will not have such an effect.

(2) Subparagraph (a) deals with the case where an the injured State has waived either the breach itself, or its consequences in terms of responsibility. This is a manifestation of the general principle of consent in relation to rights or obligations within the dispensation of a particular State.

(3) In some cases, the waiver may apply only to one aspect of the legal relationship between the injured State and the responsible State. For example, in the *Russian Indemnity* case, the Russian embassy had repeatedly demanded from Turkey a certain sum corresponding to the

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[726] The topic will be dealt with in detail in the International Law Commission's work on diplomatic protection. See Second report of the Special Rapporteur for the topic "Diplomatic protection", A/CN.4/514.

capital amount of a loan, without any reference to interest or damages for delay. Turkey having paid the sum demanded, the Tribunal held that this conduct amounted to the abandonment of any other claim arising from the loan.[727]

(4) A waiver is only effective if it is validly given. As with other manifestations of State consent, questions of validity can arise with respect to a waiver, for example, possible coercion of the State or its representative, or a material error as to the facts of the matter, arising perhaps from a misrepresentation of those facts by the responsible State. The use of the term "valid waiver" is intended to leave to the general law the question of what amounts to a valid waiver in the circumstances.[728] Of particular significance in this respect is the question of consent given by an injured State following a breach of an obligation arising from a peremptory norm of general international law, especially one to which article 40 applies. Since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law.

(5) Although it may be possible to infer a waiver from the conduct of the States concerned or from a unilateral statement, the conduct or statement must be unequivocal. In *Certain Phosphate Lands in Nauru*, it was argued that the Nauruan authorities before independence had waived the rehabilitation claim by concluding an Agreement relating to the future of the phosphate industry as well as by statements made at the time of independence. As to the former, the record of negotiations showed that the question of waiving the rehabilitation claim had been raised and not accepted, and the Agreement itself was silent on the point. As to the latter, the relevant statements were unclear and equivocal. The Court held there had been no waiver, since the conduct in question "did not at any time effect a clear and unequivocal waiver of their claims".[729]

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[727] *UNRIAA*, vol. XI, p. 421 (1912), at p. 446.

[728] Cf. the position with respect to valid consent under article 20: see commentary to article 20, paras. (4)-(8).

[729] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 240, at p. 247, para. 13.

In particular the statements relied on "[n]ot withstanding some ambiguity in the wording … did not imply any departure from the point of view expressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations".[730]

(6) Just as it may explicitly waive the right to invoke responsibility, so an injured State may acquiesce in the loss of that right. Subparagraph (b) deals with the case where an injured State is to be considered as having by reason of its conduct validly acquiesced in the lapse of the claim. The article emphasizes *conduct* of the State, which could include, where applicable, unreasonable delay, as the determining criterion for the lapse of the claim. Mere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particular where the injured State does everything it can reasonably do to maintain its claim.

(7) The principle that a State may by acquiescence lose its right to invoke responsibility was endorsed by the International Court in *Certain Phosphate Lands in Nauru*, in the following passage:

> "The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible."[731]

In the *LaGrand* case, the International Court held the German application admissible even though Germany had taken legal action some years after the breach had become known to it.[732]

(8) One concern of the rules relating to delay is that additional difficulties may be caused to the respondent State due to the lapse of time, e.g., as concerns the collection and presentation of evidence. Thus in the *Stevenson* case and the *Gentini* case, considerations of procedural fairness

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[730] Ibid., at p. 250, para. 20.

[731] Ibid., at pp. 253-254, para. 32. The Court went on to hold that, in the circumstances of the case and having regard to the history of the matter, Nauru's application was not inadmissible on this ground: ibid., para. 36. It reserved for the merits any question of prejudice to the Respondent State by reason of the delay. See further commentary to article 13, para. (8).

[732] See *LaGrand (Germany v. United States of America), Provisional Measures, I.C.J. Reports 1999*, p. 9, and *LaGrand (Germany v. United States of America), Merits*, judgement of 27 June 2001, paras. 53-57.

to the respondent State were advanced.[733] In contrast, the plea of delay has been rejected if, in the circumstances of a case, the respondent State could not establish the existence of any prejudice on its part, as where it has always had notice of the claim and was in a position to collect and preserve evidence relating to it.[734]

(9) Moreover, contrary to what may be suggested by the expression "delay", international courts have not engaged simply in measuring the lapse of time and applying clear-cut time limits. No generally accepted time limit, expressed in terms of years has been laid down.[735] The Swiss Federal Department in 1970 suggested a period of 20 to 30 years since the coming into existence of the claim.[736] Others have stated that the requirements were more exacting for contractual claims than for non-contractual claims.[737] None of the attempts to establish any precise or finite time limit for international claims in general has achieved acceptance.[738] It would be very difficult to establish any single limit, given the variety of situations, obligations and conduct that may be involved.

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[733] See *Stevenson*, *UNRIAA.*, vol. IX, p. 385 (1903); *Gentini*, ibid., vol. X, p. 557 (1903).

[734] See, e.g., *Tagliaferro*, ibid., vol. X, p. 592 (1903), at p. 593; similarly the actual decision in *Stevenson*, ibid., vol. IX, p. 385 (1903), at pp. 386-387.

[735] In some cases time limits are laid down for specific categories of claims arising under specific treaties (e.g., the six-month time limit for individual applications under article 35 (1) of the European Convention on Human Rights) notably in the area of private law (e.g., in the field of commercial transactions and international transport). See United Nations Convention on the Limitation Period in the International Sale of Goods, New York, 14 June 1974, as amended by the Protocol of 11 April 1980: United Nations, *Treaty Series*, vol. 1511, p. 99. By contrast it is highly unusual for treaty provisions dealing with inter-State claims to be subject to any express time limits.

[736] Communiqué of 29 December 1970, in *Schweizerisches Jahrbuch für Internationales Recht*, vol. 32 (1976), p. 153.

[737] C. Fleischhauer, "Prescription", in *Encyclopedia of Public International Law*, (R. Bernhardt, ed.) (Amsterdam, North Holland, 1995), vol. 3, p. 1105, at p. 1107.

[738] A large number of international decisions stress the absence of general rules, and in particular of any specific limitation period measured in years. Rather the principle of delay is a matter of appreciation having regard to the facts of the given case. Besides *Certain Phosphate Lands in Nauru,* see e.g. *Gentini*, *UNRIAA*, vol. X, p. 551 (1903), at p. 561; the *Ambatielos* arbitration, (1956) *I.L.R.*, vol. 23, p. 306, at pp. 314-317.

(10) Once a claim has been notified to the respondent State, delay in its prosecution (e.g., before an international tribunal) will not usually be regarded as rendering it inadmissible.[739] Thus in *Certain Phosphate Lands in Nauru*, the International Court held it to be sufficient that Nauru had referred to its claims in bilateral negotiations with Australia in the period preceding the formal institution of legal proceedings in 1989.[740] In the *Tagliaferro* case, Umpire Ralston likewise held that despite the lapse of 31 years since the infliction of damage, the claim was admissible as it had been notified immediately after the injury had occurred.[741]

(11) To summarize, a claim will not be inadmissible on grounds of delay unless the circumstances are such that the injured State should be considered as having acquiesced in the lapse of the claim or the respondent State has been seriously disadvantaged. International courts generally engage in a flexible weighing of relevant circumstances in the given case, taking into account such matters as the conduct of the respondent State and the importance of the rights involved. The decisive factor is whether the respondent State has suffered any prejudice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued. Even if there has been some prejudice, it may be able to be taken into account in determining the form or extent of reparation.[742]

Article 46

Plurality of injured States

> Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

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[739] For statements of the distinction between notice of claim and commencement of proceedings see, e.g., R. Jennings and A.D. Watts (eds.) *Oppenheim's International Law,* (9th edn.) (London, Longmans, 1992) vol. I, p. 527; C. Rousseau, *Droit international public* (Paris, Sirey, 1983), vol. V, p. 182.

[740] *I.C.J. Reports 1992*, p. 240, at p. 250, para. 20.

[741] *Tagliaferro*, UN*RIAA.*, vol. X, p. 592 (1903), at p. 593.

[742] See article 39 and commentary.

Commentary

(1) Article 46 deals with the situation of a plurality of injured States, in the sense defined in article 42. It states the principle that where there are several injured States, each of them may separately invoke the responsibility for the internationally wrongful act on its own account.

(2) Several States may qualify as "injured" States under article 42. For example, all the States to which an interdependent obligation is owed within the meaning of article 42 (b) (ii) are injured by its breach. In a situation of a plurality of injured States each may seek cessation of the wrongful act if it is continuing, and claim reparation in respect of the injury to itself. This conclusion has never been doubted, and is implicit in the terms of article 42 itself.

(3) It is by no means unusual for claims arising from the same internationally wrongful act to be brought by several States. For example in *The S.S. Wimbledon*, four States brought proceedings before the Permanent Court of International Justice under article 386 (1) of the Treaty of Versailles, which allowed "any interested Power" to apply in the event of a violation of the provisions of the Treaty concerning transit through the Kiel Canal. The Court noted that "each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags". It held they were each covered by article 386 (1) "even though they may be unable to adduce a prejudice to any pecuniary interest".[743] In fact only France, representing the operator of the vessel, claimed and was awarded compensation. In the cases concerning the *Aerial Incident of 27 July 1955*, proceedings were commenced by the United States, the United Kingdom and Israel against Bulgaria concerning the destruction of an Israeli civil aircraft and the loss of lives involved.[744] In the *Nuclear Tests* cases, Australia and New Zealand each claimed to be injured in various ways by the French conduct of atmospheric nuclear tests at Mururoa Atoll.[745]

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[743] *1923, P.C.I.J., Series A, No. 1 at p. 20*

[744] The Court held that it lacked jurisdiction over the Israeli claim: *I.C.J. Reports 1959*, p. 127 after which the United Kingdom and United States claims were withdrawn. In its Memorial, Israel noted that there had been active coordination of the claims between the various claimant governments, and added: "One of the primary reasons for establishing coordination of this character from the earliest stage was to prevent, as far as possible, the Bulgarian Government being faced with double claims leading to the possibility of double damages." *Aerial Incident of 27 July 1955*. Pleadings, *Oral Arguments, Documents*, p. 106.

[745] See *Nuclear Tests (Australia v. France), I.C.J. Reports 1974*, p. 253 at p. 256; *Nuclear Tests (New Zealand v. France), I.C.J. Reports 1974*, p. 457 at p. 460.

(4) Where the States concerned do not claim compensation on their own account as distinct from a declaration of the legal situation, it may not be clear whether they are claiming as injured States or as States invoking responsibility in the common or general interest under article 48. Indeed, in such cases it may not be necessary to decide into which category they fall, provided it is clear that they fall into one or the other. Where there is more than one injured State claiming compensation on its own account or on account of its nationals, evidently each State will be limited to the damage actually suffered. Circumstances might also arise in which several States injured by the same act made incompatible claims. For example, one State may claim restitution whereas the other may prefer compensation. If restitution is indivisible in such a case and the election of the second State is valid, it may be that compensation is appropriate in respect of both claims.[746] In any event, two injured States each claiming in respect of the same wrongful act would be expected to coordinate their claims so as to avoid double recovery As the International Court pointed out in the *Reparations* opinion, "International tribunals are already familiar with the problem of a claim in which two or more national States are interested, and they know how to protect the defendant State in such a case".[747]

Article 47

Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(*a*) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(*b*) Is without prejudice to any right of recourse against the other responsible States.

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[746] CF. *Forests of Central Rhodope*, where the arbitrator declined to award restitution *inter alia* on the ground that not all the persons or entities interested in restitution had claimed: *UNRIAA*, vol. 3 p. 1405 (1993), at p. 1432.

[747] *I.C.J. Reports 1949*, p. 174 at p. 186.

Commentary

(1) Article 47 deals with the situation where there is a plurality of responsible States in respect of the same wrongful act. It states the general principle that in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act.

(2) Several States may be responsible for the same internationally wrongful act in a range of circumstances. For example two or more States might combine in carrying out together an internationally wrongful act in circumstances where they may be regarded as acting jointly in respect of the entire operation. In that case the injured State can hold each responsible State to account for the wrongful conduct as a whole. Or two States may act through a common organ which carries out the conduct in question, e.g. a joint authority responsible for the management of a boundary river. Or one State may direct and control another State in the commission of the same internationally wrongful act by the latter, such that both are responsible for the act.[748]

(3) It is important not to assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as "joint", "joint and several" and "solidary" responsibility derive from different legal traditions[749] and analogies must be applied with care. In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of article 2. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.[750] In the application of that principle, however, the situation can arise where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them. It is to such cases that article 47 is addressed.

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[748] See article 17 and commentary.

[749] For a comparative survey of internal laws on solidary or joint liability see J.A. Weir, "Complex Liabilities" in A. Tunc (ed.), *International Encyclopedia of Comparative Law* (Tübingen, Mohr, 1983), vol. XI, Torts, esp. pp. 43-44, sections 79-81.

[750] See introductory commentary to Part One, chapter IV, paras. (1)-(5).

(4) In the *Certain Phosphate Lands in Nauru* case,[751] Australia, the sole respondent, had administered Nauru as a trust territory under the Trusteeship Agreement on behalf of the three States concerned. Australia argued that it could not be sued alone by Nauru, but only jointly with the other two States concerned. Australia argued that the two States were necessary parties to the case and that in accordance with the principle formulated in *Monetary Gold*,[752] the claim against Australia alone was inadmissible. It also argued that the responsibility of the three States making up the Administering Authority was "solidary" and that a claim could not be made against only one of them. The Court rejected both arguments. On the question of "solidary" responsibility it said:

> "... Australia has raised the question whether the liability of the three States would be 'joint and several' *(solidaire)*, so that any one of the three would be liable to make full reparation for damage flowing from any breach of the obligations of the Administering Authority, and not merely a one-third or some other proportionate share. This ... is independent of the question whether Australia can be sued alone. The Court does not consider that any reason has been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis* merely because that claim raises questions of the administration of the Territory, which was shared with two other States. It cannot be denied that Australia had obligations under the Trusteeship Agreement, in its capacity as one of the three States forming the Administering Authority, and there is nothing in the character of that Agreement which debars the Court from considering a claim of a breach of those obligations by Australia."[753]

The Court was careful to add that its decision on jurisdiction "does not settle the question whether reparation would be due from Australia, if found responsible, for the whole or only for part of the damage Nauru alleges it has suffered, regard being had to the characteristics of the Mandate and Trusteeship Systems … and, in particular, the special role played by Australia in the administration of the Territory".[754]

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[751] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 240.

[752] *Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954*, p. 19. See further commentary to article 16, para. (11).

[753] *Certain Phosphate Lands in Nauru, I.C.J. Reports 1992*, p. 240, at p. 258-259, para. 48.

(5) The extent of responsibility for conduct carried on by a number of States is sometimes addressed in treaties.[755] A well-known example is the Convention on the International Liability for Damage caused by Space Objects of 29 March 1972.[756] Article IV (1) provides expressly for "joint and several liability" where damage is suffered by a third State as a result of a collision between two space objects launched by two States. In some cases liability is strict; in others it is based on fault. Article IV (2) provides:

> "In all cases of joint and several liability referred to in paragraph 1 … the burden of compensation for the damage shall be apportioned between the first two States in accordance with the extent to which they were at fault; if the extent of the fault of each of these States cannot be established, the burden of compensation shall be apportioned equally between them. Such apportionment shall be without prejudice to the right of the third State to seek the entire compensation due under this Convention from any or all of the launching States which are jointly and severally liable."[757]

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[754] Ibid., at p. 262, para. 56. The case was subsequently withdrawn by agreement, Australia agreeing to pay by instalments an amount corresponding to the full amount of Nauru's claim. Subsequently, the two other Governments agreed to contribute to the payments made under the settlement. See *I.C.J. Reports 1993*, p. 322, and for the Settlement Agreement of 10 August 1993, see United Nations, *Treaty Series*, vol. 1770, p. 379.

[755] A special case is the responsibility of the European Union and its member States under "mixed agreements", where the Union and all or some members are parties in their own name. See e.g. Annex IX to the United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, United Nations, *Treaty Series*, vol. 1833, p. 396. Generally on mixed agreements, see, e.g., A. Rosas, "Mixed Union – Mixed Agreements", in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (The Hague, Kluwer, 1998), p. 125.

[756] United Nations, *Treaty Series*, vol. 961, p. 187.

[757] See also art. V (2), which provides for indemnification between States which are jointly and severally liable.

This is clearly a *lex specialis*, and it concerns liability for lawful conduct rather than responsibility in the sense of the present Articles.[758] At the same time it indicates what a regime of "joint and several" liability might amount to so far as an injured State is concerned.

(6) According to paragraph 1 of article 47, where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act. The general rule in international law is that of separate responsibility of a State for its own wrongful acts and paragraph 1 reflects this general rule. Paragraph 1 neither recognizes a general rule of joint and several responsibility, nor does it exclude the possibility that two or more States will be responsible for the same internationally wrongful act. Whether this is so will depend on the circumstances and on the international obligations of each of the States concerned.

(7) Under article 47 (1), where several States are each responsible for the same internationally wrongful act, the responsibility of each may be separately invoked by an injured State in the sense of article 42. The consequences that flow from the wrongful act, for example in terms of reparation, will be those which flow from the provisions of Part Two in relation to that State.

(8) Article 47 only addresses the situation of a plurality of responsible States in relation to the same internationally wrongful act. The identification of such an act will depend on the particular primary obligation, and cannot be prescribed in the abstract. Of course situations can also arise where several States by separate internationally wrongful conduct have contributed to cause the same damage. For example, several States might contribute to polluting a river by the separate discharge of pollutants. In the *Corfu Channel* incident, it appears that Yugoslavia actually laid the mines and would have been responsible for the damage they caused. The International Court held that Albania was responsible to the United Kingdom for the same damage on the basis that it knew or should have known of the presence of the mines and of the attempt by the British ships to exercise their right of transit, but failed to warn the ships.[759] Yet it was not suggested that Albania's responsibility for failure to warn was reduced, let alone

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[758] See the introductory commentary, para. 4 for the distinction between international responsibility for wrongful acts and international liability arising from lawful conduct.

[759] *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 4, at pp. 22-23.

precluded, by reason of the concurrent responsibility of a third State. In such cases, the responsibility of each participating State is determined individually, on the basis of its own conduct and by reference to its own international obligations.

(9) The general principle set out in paragraph 1 of article 47 is subject to the two provisos set out in paragraph 2. Subparagraph (a) addresses the question of double recovery by the injured State. It provides that the injured State may not recover, by way of compensation, more than the damage suffered.[760] This provision is designed to protect the responsible States, whose obligation to compensate is limited by the damage suffered. The principle is only concerned to ensure against the actual recovery of more than the amount of the damage. It would not exclude simultaneous awards against two or more responsible States, but the award would be satisfied so far as the injured State is concerned by payment in full made by any one of them.

(10) The second proviso, in subparagraph (b), recognizes that where there is more than one responsible State in respect of the same injury, questions of contribution may arise between them. This is specifically envisaged, for example, in articles IV (2) and V (2) of the 1972 Outer Space Liability Convention.[761] On the other hand, there may be cases where recourse by one responsible State against another should not be allowed. Subparagraph (b) does not address the question of contribution among several States which are responsible for the same wrongful act; it merely provides that the general principle stated in paragraph 1 is without prejudice to any right of recourse which one responsible State may have against any other responsible State.

Article 48

Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(*a*) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

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[760] Such a principle was affirmed, for example, by the Permanent Court in *Factory at Chorzów*, when it held that a remedy sought by Germany could not be granted "or the same compensation would be awarded twice over". *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17,* at p. 59; see also ibid., at pp. 45, 49.

[761] Convention on the International Liability for Damage caused by Space Objects, United Nations, *Treaty Series*, vol. 961, p. 187.

(*b*) The obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(*a*) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(*b*) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Commentary

(1) Article 48 complements the rule contained in article 42. It deals with the invocation of responsibility by States other than the injured State acting in the collective interest. A State which is entitled to invoke responsibility under article 48 is acting not in its individual capacity by reason of having suffered injury but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole. The distinction is underlined by the phrase "[a]ny State other than an injured State" in paragraph 1 of article 48.

(2) Article 48 is based on the idea that in case of breaches of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured in the sense of article 42. Indeed in respect of obligations to the international community as a whole, the International Court specifically said as much in its judgment in the *Barcelona Traction* case.[762] Although the Court noted that "all States can be held to have a legal interest in" the fulfilment of these rights, article 48 refrains from qualifying the position of the States identified in article 48, for example by referring to them as "interested States". The term "legal interest" would not permit a distinction between articles 42 and 48, as injured States in the sense of article 42 also have legal interests.

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[762] *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33.

(3) As to the structure of article 48, paragraph 1 defines the categories of obligations which give rise to the wider right to invoke responsibility. Paragraph 2 stipulates which forms of responsibility States other than injured States may claim. Paragraph 3 applies the requirements of invocation contained in articles 43, 44 and 45 to cases where responsibility is invoked under article 48 (1).

(4) Paragraph 1 refers to "[a]ny State other than an injured State". In the nature of things all or many States will be entitled to invoke responsibility under article 48, and the term "[a]ny State" is intended to avoid any implication that these States have to act together or in unison. Moreover their entitlement will coincide with that of any injured State in relation to the same internationally wrongful act in those cases where a State suffers individual injury from a breach of an obligation to which article 48 applies.

(5) Paragraph 1 defines the categories of obligations the breach of which may entitle States other than the injured State to invoke State responsibility. A distinction is drawn between obligations owed to a group of States and established to protect a collective interest of the group (subparagraph (1) (a)), and obligations owed to the international community as a whole (subparagraph (1) (b)).[763]

(6) Under subparagraph (1) (a), States other than the injured State may invoke responsibility if two conditions are met: first, the obligation whose breach has given rise to responsibility must have been owed to a group to which the State invoking responsibility belongs; and second, the obligation must have been established for the protection of a collective interest. The provision does not distinguish between different sources of international law; obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. Such obligations have sometimes been referred to as "obligations *erga omnes partes*".

(7) Obligations coming within the scope of subparagraph (1) (a) have to be "collective obligations", i.e. they must apply between a group of States and have been established in some collective interest.[764] They might concern, for example, the environment or security of a region (e.g. a regional nuclear free zone treaty or a regional system for the protection of human rights). They are not limited to arrangements established only in the interest of the member States but

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[763] For the extent of responsibility for serious breaches of obligations to the international community as a whole see Part Two, chapter III and commentary.

[764] See also commentary to article 42, para. (11).

would extend to agreements established by a group of States in some wider common interest.[765] But in any event the arrangement must transcend the sphere of bilateral relations of the States parties. As to the requirement that the obligation in question protect a collective interest, it is not the function of the Articles to provide an enumeration of such interests. If they fall within subparagraph (1) (a), their principal purpose will be to foster a common interest, over and above any interests of the States concerned individually. This would include situations in which States, attempting to set general standards of protection for a group or people, have assumed obligations protecting non-State entities.[766]

(8) Under subparagraph (1) (b), States other than the injured State may invoke responsibility if the obligation in question was owed "to the international community as a whole".[767] The provision intends to give effect to the International Court's statement in the *Barcelona Traction* case, where the Court drew "an essential distinction" between obligations owed to particular States and those owed "towards the international community as a whole".[768] With regard to the latter, the Court went on to state that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".

(9) While taking up the essence of this statement, the Articles avoid use of the term "obligations *erga omnes*", which conveys less information than the Court's reference to the international community as a whole and has sometimes been confused with obligations owed to all the parties to a treaty. Nor is it the function of the Articles to provide a list of those obligations which under existing international law are owed to the international community as a

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[765] In the *S.S. Wimbledon*, the Court noted "[t]he intention of the authors of the Treaty of Versailles to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind": *1928, P.C.I.J., Series A, No. 1*, at p. 23.

[766] Art. 22 of the League of Nations Covenant, establishing the Mandate system, was a provision in the general interest in this sense, as were each of the Mandate agreements concluded in accordance with it. Cf., however, the much-criticized decision of the International Court in *South West Africa, Second Phase, I.C.J. Reports 1966*, p. 6, from which article 48 is a deliberate departure.

[767] For the terminology "international community as a whole" see commentary to article 25, para. (18).

[768] *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3, at p. 32, para. 33, and see commentary to Part Two, chapter III, paras. (2)-(6).

whole. This would go well beyond the task of codifying the secondary rules of State responsibility, and in any event, such a list would be only of limited value, as the scope of the concept will necessarily evolve over time. The Court itself has given useful guidance: in its 1970 judgment it referred by way of example to "the outlawing of acts of aggression, and of genocide" and to "the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[769] In its judgment in the *East Timor* case, the Court added the right of self-determination of peoples to this list.[770]

(10) Each State is entitled, as a member of the international community as a whole, to invoke the responsibility of another State for breaches of such obligations. Whereas the category of collective obligations covered by subparagraph (1) (a) needs to be further qualified by the insertion of additional criteria, no such qualifications are necessary in the case of subparagraph (1) (b). All States are by definition members of the international community as a whole, and the obligations in question are by definition collective obligations protecting interests of the international community as such. Of course such obligations may at the same time protect the individual interests of States, as the prohibition of acts of aggression protects the survival of each State and the security of its people. Similarly, individual States may be specially affected by the breach of such an obligation, for example a coastal State specially affected by pollution in breach of an obligation aimed at protection of the marine environment in the collective interest.

(11) Paragraph 2 specifies the categories of claim which States may make when invoking responsibility under article 48. The list given in the paragraph is exhaustive, and invocation of responsibility under article 48 gives rise to a more limited range of rights as compared to those of injured States under article 42. In particular, the focus of action by a State under article 48 - such State not being injured in its own right and therefore not claiming compensation on its own account - is likely to be on the very question whether a State is in breach and on cessation if the breach is a continuing one. For example in *The S.S. Wimbledon*, Japan which had no economic interest in the particular voyage sought only a declaration, whereas France, whose national had

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[769] Ibid., at p. 32, para. 34.

[770] *I.C.J. Reports 1995*, p. 90, at p. 102, para. 29.

to bear the loss, sought and was awarded damages.[771] In the *South West Africa* cases, Ethiopia and Liberia sought only declarations of the legal position.[772] In that case, as the Court itself pointed out in 1971, "the injured entity" was a people, viz. the people of South West Africa.[773]

(12) Under paragraph 2 (a), any State referred to in article 48 is entitled to request cessation of the wrongful act and, if the circumstances require assurances and guarantees of non-repetition under article 30. In addition, subparagraph 2 (b) allows such a State to claim from the responsible State reparation in accordance with the provisions of chapter II of Part Two. In case of breaches of obligations under article 48, it may well be that there is no State which is individually injured by the breach, yet it is highly desirable that some State or States be in a position to claim reparation, in particular restitution. In accordance with subparagraph 2 (b), such a claim must be made in the interest of the injured State, if any, or of the beneficiaries of the obligation breached. This aspect of article 48 (2) involves a measure of progressive development, which is justified since it provides a means of protecting the community or collective interest at stake. In this context it may be noted that certain provisions, for example in various human rights treaties, allow invocation of responsibility by any State party. In those cases where they have been resorted to, a clear distinction has been drawn between the capacity of the applicant State to raise the matter and the interests of the beneficiaries of the obligation.[774] Thus a State invoking responsibility under article 48 and claiming anything more than a declaratory remedy and cessation may be called on to establish that it is acting in the interest of the injured party. Where the injured party is a State, its government will be able authoritatively to represent that interest. Other cases may present greater difficulties, which the present Articles cannot solve.[775] Paragraph 2 (b) can do no more than set out the general principle.

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[771] *1928, P.C.I.J., Series A, No. 1*, at p. 30.

[772] *South West Africa, Preliminary Objections, I.C.J. Reports 1962*, p. 319; *South West Africa, Second Phase, I.C.J. Reports 1966*, p. 6.

[773] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 12, at p. 56, para. 127.

[774] See e.g. the observations of the European Court of Human Rights in *Denmark v. Tvrkey, Friendly Settlement*, judgment of 5 April 2000, paras. 20, 23.

[775] See also commentary to article 33, paras. (3)-(4).

(13) Subparagraph 2 (b) refers to the State claiming "[p]erformance of the obligation of reparation in accordance with the preceding articles". This makes it clear that article 48 States may not demand reparation in situations where an injured State could not do so. For example a demand for cessation presupposes the continuation of the wrongful act; a demand for restitution is excluded if restitution itself has become impossible.

(14) Paragraph 3 subjects the invocation of State responsibility by States other than the injured State to the conditions that govern invocation by an injured State, specifically article 43 (notice of claim), 44 (admissibility of claims) and 45 (loss of the right to invoke responsibility). These articles are to be read as applicable equally, *mutatis mutandis*, to a State invoking responsibility under article 48.

Chapter II

Countermeasures

(1) This chapter deals with the conditions and limitations on the taking of countermeasures by an injured State. In other words, it deals with measures, which would otherwise be contrary to the international obligations of an injured State vis-à-vis the responsible State. They were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation. Countermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.

(2) It is recognized both by governments and by the decisions of international tribunals that countermeasures are justified under certain circumstances.[776] This is reflected in article 23 which deals with countermeasures in response to an internationally wrongful act in the context of the circumstances precluding wrongfulness. Like other forms of self-help, countermeasures are liable to abuse and this potential is exacerbated by the factual inequalities between States. Chapter II has as its aim to establish an operational system, taking into account the exceptional

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[776] For the substantial literature see the bibliographies in E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, N.Y., Transnational Publishers, 1984), pp. 179-189; O.Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford, Clarendon Press, 1988), pp. 37-41; L-A. Sicilianos, *Les réactions décentralisées à l'illicite* (Paris, L.D.G.J., 1990) pp. 501-525. P. Alland, *Justice privée et ordre juridique international: Etude théorique des contre-mesures au droit international publique,* (Paris, Pedone, 1994).

character of countermeasures as a response to internationally wrongful conduct. At the same time, it seeks to ensure, by appropriate conditions and limitations, that countermeasures are kept within generally acceptable bounds.

(3) As to terminology, traditionally the term "reprisals" was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach.[777] More recently the term "reprisals" has been limited to action taken in time of international armed conflict; i.e., it has been taken as equivalent to belligerent reprisals. The term "countermeasures" covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter.[778] Countermeasures are to be contrasted with retorsion, i.e. "unfriendly" conduct which is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act. Acts of retorsion may include the prohibition of or limitations upon normal diplomatic relations or other contacts, embargos of various kinds or withdrawal of voluntary aid programs. Whatever their motivation, so long as such acts are not incompatible with the international obligations of the States taking them towards the target State, they do not involve countermeasures and they fall outside the scope of the present Articles. The term "sanction" is also often used as equivalent to action taken against a State by a group of States or mandated by an international organization. But the term is imprecise: Chapter VII of the United Nations Charter refers only to "measures", even though these can encompass a very wide range of acts, including the use of armed force.[779] Questions concerning the use of force in international relations and of the legality of belligerent reprisals are governed by the relevant primary rules. On the other hand the Articles are concerned with countermeasures as referred to

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[777] See, e.g., E. de Vattel, *Le droit des gens ou principes de la loi naturelle* (1758, repr. Washington, Carnegie Institution, 1916), Bk. II, ch. XVIII, section 342.

[778] See *Air Services Agreement of 27 March 1946 (United States v. France), UNRIAA*, vol. XVIII, p. 416 (1979), at p. 416, para. 80; *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at p. 27, para. 53; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986*, p. 14, at p. 102, para. 201; *Gabčikovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997*, p. 7, at p. 55, para. 82.

[779] Charter of the United Nations, Arts. 39, 41, 42.

in article 23. They are taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two. They are instrumental in character and are appropriately dealt with in Part Three as an aspect of the implementation of State responsibility.

(4) Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the Vienna Convention on the Law of Treaties. Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of the States parties will be affected, but this is quite different from the question of responsibility that may already have arisen from the breach.[780] Countermeasures involve conduct taken in derogation from a subsisting treaty obligation but justified as a necessary and proportionate response to an internationally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved.

(5) This chapter does not draw any distinction between what are sometimes called "reciprocal countermeasures" and other measures. That term refers to countermeasures which involve suspension of performance of obligations towards the responsible State "if such obligations correspond to, or are directly connected with, the obligation breached".[781] There is no requirement that States taking countermeasures are limited to suspension of performance of the same or a closely related obligation.[782] A number of considerations support this conclusion. First, for some obligations, for example those concerning the protection of human rights, reciprocal countermeasures are inconceivable. The obligations in question have a non-reciprocal character and are not only due to other States but to the individuals themselves.[783] Secondly, a limitation to reciprocal countermeasures assumes that the injured State will be in a position to impose the same or related measures as the responsible State, which may not be so.

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[780] Cf. Vienna Convention on the Law of Treaties, United Nations, *Treaty Series,* vol. 1155, p. 331, arts. 70, 73, and on the respective scope of the codified law of treaties and the law of State responsibility see introductory commentary to Part One, chapter V, paras. (3)-(7).

[781] See *Yearbook ... 1985*, vol. II, Part 1, p. 10.

[782] Contrast the exception of non-performance in the law of treaties, which is so limited: see introductory commentary to Part One, chapter V, para. (9).

[783] Cf. *Ireland* v. *United Kingdom,* E.C.H.R., Ser. A No. 25 (1978).

The obligation may be a unilateral one or the injured State may already have performed its side of the bargain. Above all, considerations of good order and humanity preclude many measures of a reciprocal nature. This conclusion does not, however, end the matter. Countermeasures are more likely to satisfy the requirements of necessity and proportionality if they are taken in relation to the same or a closely related obligation, as in the *Air Services* arbitration.[784]

(6) This conclusion reinforces the need to ensure that countermeasures are strictly limited to the requirements of the situation and that there are adequate safeguards against abuse. Chapter II seeks to do this in a variety of ways. First, as already noted, it concerns only non-forcible countermeasures (article 50 (1) (a)). Secondly, countermeasures are limited by the requirement that they are directed at the responsible State and not at third parties (article 49 (1) and (2)). Thirdly, since countermeasures are intended as instrumental - in other words, since they are taken with a view to procuring cessation of and reparation for the internationally wrongful act and not by way of punishment - they are temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States (articles 49 (2) (3), 53). Fourthly, countermeasures must be proportionate (article 51). Fifthly, they must not involve any departure from certain basic obligations (article 50 (1)), in particular those under peremptory norms of general international law.

(7) This chapter also deals to some extent with the conditions of the implementation of countermeasures. In particular, countermeasures cannot affect any dispute settlement procedure which is in force between the two States and applicable to the dispute (article 50 (2) (a)). Nor can they be taken in such a way as to impair diplomatic or consular inviolability (article 50 (2) (b)). Countermeasures must be preceded by a demand by the injured State that the responsible State comply with its obligations under Part Two, must be accompanied by an offer to negotiate, and must be suspended if the internationally wrongful act has ceased and the dispute is submitted in good faith to a court or tribunal with the authority to make decisions binding on the parties (article 52 (3)).

(8) The focus of the chapter is on countermeasures taken by injured States as defined in article 42. Occasions have arisen in practice of countermeasures being taken by other States, in particular those identified in article 48, where no State is injured or else on behalf of and at the request of an injured State. Such cases are controversial and the practice is embryonic.

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[784] *UNRIAA*, vol. XVIII, p. 416 (1979).

This chapter does not purport to regulate the taking of countermeasures by States other than the injured State. It is, however, without prejudice to the right of any State identified in article 48 (1) to take lawful measures against a responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached (article 54).

(9) In common with other chapters of these Articles, the provisions on countermeasures are residual and may be excluded or modified by a special rule to the contrary (see article 55). Thus a treaty provision precluding the suspension of performance of an obligation under any circumstances will exclude countermeasures with respect to the performance of the obligation. Likewise a regime for dispute resolution to which States must resort in the event of a dispute, especially if (as with the WTO dispute settlement system) it requires an authorization to take measures in the nature of countermeasures in response to a proven breach.[785]

Article 49

Object and limits of countermeasures

> 1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.
>
> 2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
>
> 3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Commentary

(1) Article 49 describes the permissible object of countermeasures taken by an injured State against the responsible State and places certain limits on their scope. Countermeasures may only be taken by an injured State in order to induce the responsible State to comply with its obligations under Part Two, namely, to cease the internationally wrongful conduct, if it is

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[785] See WTO, Understanding on Rules and Procedures governing the Settlement of Disputes, arts. 1, 3 (7), 22.

continuing, and to provide reparation to the injured State.[786] Countermeasures are not intended as a form of punishment for wrongful conduct but as an instrument for achieving compliance with the obligations of the responsible State under Part Two. The limited object and exceptional nature of countermeasures are indicated by the use of the word "only" in paragraph 1 of Article 49.

(2) A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the State taking the countermeasure. This point was clearly made by the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case, in the following passage:

> "In order to be justifiable, a countermeasure must meet certain conditions … In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State."[787]

(3) Paragraph 1 of article 49 presupposes an objective standard for the taking of countermeasures, and in particular requires that the countermeasure be taken against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations of cessation and reparation. A State taking countermeasures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded. A State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own

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[786] For these obligations see articles 30 and 31 and commentaries.

[787] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997,* p. 7, at p. 55, para. 83. See also *"Naulilaa" (Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa), UNRIAA,* vol. II, p. 1013 (1928), at p. 1027; *"Cysne" (Responsibility of Germany for acts committed subsequent to 31 July 1914 and before Portugal entered into the war),* ibid., vol. II, p. 1035 (1930), at p. 1057. At the 1930 Hague Codification Conference, all States which responded on this point took the view that a prior wrongful act was an indispensable prerequisite for the adoption of reprisals; see League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee,* Vol. III: *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (Doc. C.75.M.69.1929.V.), p. 128.

risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment.[788] In this respect there is no difference between countermeasures and other circumstances precluding wrongfulness.[789]

(4) A second essential element of countermeasures is that they "must be directed against"[790] a State which has committed an internationally wrongful act, and which has not complied with its obligations of cessation and reparation under Part Two of the present Articles.[791] The word "only" in paragraph 1 applies equally to the target of the countermeasures as to their purpose and is intended to convey that countermeasures may only be adopted against a State which is the author of the internationally wrongful act. Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third State. In that sense the effect of countermeasures in precluding wrongfulness is relative. It concerns the legal relations between the injured State and the responsible State.[792]

(5) This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties. For example, if the injured State suspends transit rights with the responsible State in accordance with this chapter, other parties, including third States, may be affected thereby. If they have no individual rights in the matter they cannot complain. Similarly

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[788] The Tribunal's remark in the *Air Services* case, to the effect that "each State establishes for itself its legal situation vis-à-vis other States", (*UNRIAA*, vol. XVIII, p. 416 (1979), at p. 443, para. 81) should not be interpreted in the sense that the United States would have been justified in taking countermeasures whether or not France was in breach of the Agreement. In that case the Tribunal went on to hold that the United States was actually responding to a breach of the Agreement by France, and that its response met the requirements for countermeasures under international law, in particular in terms of purpose and proportionality. The Tribunal did not decide that an unjustified belief by the United States as to the existence of a breach would have been sufficient.

[789] See introductory commentary to Part One, chapter V, para. (8).

[790] *Gabčíkovo-Nagymaros Project, I.C.J. Reports 1997,* p. 7, at pp. 55-56, para. 83.

[791] Ibid. In *Gabčíkovo-Nagymaros Project* the Court held that the requirement had been satisfied, in that Hungary was in continuing breach of its obligations under a bilateral treaty, and Chechoslovakia's response was directed against it on that ground.

[792] On the specific question of human rights obligations see article 50 (1) (b) and commentary.

if, as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided.

(6) In taking countermeasures, the injured State effectively withholds performance for the time being of one or more international obligations owed by it to the responsible State, and paragraph 2 of article 49 reflects this element. Although countermeasures will normally take the form of the non-performance of a single obligation, it is possible that a particular measure may affect the performance of several obligations simultaneously. For this reason, paragraph 2 refers to "obligations" in the plural. For example, freezing of the assets of a State might involve what would otherwise be the breach of several obligations to that State under different agreements or arrangements. Different and coexisting obligations might be affected by the same act. The test is always that of proportionality, and a State which has committed an internationally wrongful act does not thereby make itself the target for any form or combination of countermeasures irrespective of their severity or consequences.[793]

(7) The phrase "for the time being" in paragraph 2 indicates the temporary or provisional character of countermeasures. Their aim is the restoration of a condition of legality as between the injured State and the responsible State, and not the creation of new situations which cannot be rectified whatever the response of the latter State to the claims against it.[794] Countermeasures are taken as a form of inducement, not punishment: if they are effective in inducing the responsible State to comply with its obligations of cessation and reparation, they should be discontinued and performance of the obligation resumed.

(8) Paragraph 1 of article 49 refers to the obligations of the responsible State "under Part Two". It is to ensuring the performance of these obligations that countermeasures are directed. In many cases the main focus of countermeasures will be to ensure cessation of a continuing wrongful act but they may also be taken to ensure reparation, provided the other conditions laid down in chapter II are satisfied. Any other conclusion would immunize from countermeasures a State responsible for an internationally wrongful act if the act had ceased,

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[793] See article 51 and commentary. In addition, the performance of certain obligations may not be withheld by way of countermeasures in any circumstances: see article 50 and commentary.

[794] This notion is further emphasized by paragraph 3 and article 53 (termination of countermeasures).

irrespective of the seriousness of the breach or its consequences, or of the State's refusal to make reparation for it. In this context an issue arises whether countermeasures should be available where there is a failure to provide satisfaction as demanded by the injured State, given the subsidiary role this remedy plays in the spectrum of reparation.[795] In normal situations, satisfaction will be symbolic or supplementary and it would be highly unlikely that a State which had ceased the wrongful act and tendered compensation to the injured State could properly be made the target of countermeasures for failing to provide satisfaction as well. This concern may be adequately addressed by the application of the notion of proportionality set out in article 51.[796]

(9) Paragraph 3 of article 49 is inspired by article 72 (2) of the Vienna Convention on the Law of Treaties, which provides that when a State suspends a treaty it must not, during the suspension, do anything to preclude the treaty from being brought back into force. By analogy, States should as far as possible choose countermeasures that are reversible. In the *Gabčíkovo-Nagymaros Project* case, the existence of this condition was recognized by the Court, although it found it was not necessary to pronounce on the matter. After concluding that "the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate", the Court said:

> "It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible."[797]

However, the duty to choose measures that are reversible is not absolute. It may not be possible in all cases to reverse all of the effects of countermeasures after the occasion for taking them has ceased. For example, a requirement of notification of some activity is of no value after the activity has been undertaken. By contrast, inflicting irreparable damage on the responsible State could amount to punishment or a sanction for non-compliance, not a countermeasure as conceived in the Articles. The phrase "as far as possible" in paragraph 3 indicates that if the injured State has a choice between a number of lawful and effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures.

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[795] See commentary to article 37, para. (1).

[796] Similar considerations apply to assurances and guarantees of non-repetition. See article 30 (b) and commentary.

[797] *Gabčíkovo-Nagymaros Project, I.C.J. Reports 1997,* p. 7, at pp. 56-57, para. 87.

Article 50

Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(*a*) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(*b*) Obligations for the protection of fundamental human rights;

(*c*) Obligations of a humanitarian character prohibiting reprisals;

(*d*) Other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(*a*) Under any dispute settlement procedure applicable between it and the responsible State;

(*b*) To respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Commentary

(1) Article 50 specifies certain obligations the performance of which may not be impaired by countermeasures. An injured State is required to continue to respect these obligations in its relations with the responsible State, and may not rely on a breach by the responsible State of its obligations under Part Two to preclude the wrongfulness of any non-compliance with these obligations. So far as the law of countermeasures is concerned, they are sacrosanct.

(2) The obligations dealt with in article 50 fall into two basic categories. Paragraph 1 deals with certain obligations which by reason of their character must not be the subject of countermeasures at all. Paragraph 2 deals with certain obligations relating in particular to the maintenance of channels of communication between the two States concerned, including machinery for the resolution of their disputes.

(3) Paragraph 1 of article 50 identifies four categories of fundamental substantive obligations which may not be affected by countermeasures: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations, (b) obligations for the protection of fundamental human rights, (c) obligations of a humanitarian character prohibiting reprisals and (d) other obligations under peremptory norms of general international law.

(4) Subparagraph (1) (a) deals with the prohibition of the threat or use of force as embodied in the United Nations Charter, including the express prohibition of the use of force in Article 2 (4). It excludes forcible measures from the ambit of permissible countermeasures under chapter II.

(5) The prohibition of forcible countermeasures is spelled out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by which the General Assembly of the United Nations proclaimed that "States have a duty to refrain from acts of reprisal involving the use of force."[798] The prohibition is also consistent with prevailing doctrine as well as a number of authoritative pronouncements of international judicial[799] and other bodies.[800]

(6) Subparagraph (1) (b) provides that countermeasures may not affect obligations for the protection of fundamental human rights. In the *"Naulilaa"* arbitration, the Tribunal stated that a lawful countermeasure must be "limited by the requirements of humanity and the rules of good faith applicable in relations between States".[801] The International Law Association in

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[798] General Assembly resolution 2625 (XXV) of 24 October 1970, first principle, para. 6. The Helsinki Final Act of 1 August 1975 also contains an explicit condemnation of forcible measures. Part of Principle II of the Declaration of Principles embodied in the first "Basket" of that Final Act reads: "Likewise [the participating States] will also refrain in their mutual relations from any act of reprisal by force."

[799] See esp. *Corfu Channel, Merits, I.C.J. Reports 1949*, p. 4, at p. 35; *Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, p. 16, at p. 127, para. 249.

[800] See, e.g., Security Council resolution 111 (1956), resolution 171 (1962), resolution 188 (1964), resolution 316 (1972), resolution 332 (1973), resolution 573 (1985) and resolution 1322 (2000). Also see General Assembly resolution 41/38 (20 November 1986).

[801] *"Naulilaa" (Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa), UNRIAA*, vol. II, p. 1013 (1928), at p. 1026.

its 1934 resolution stated that in taking countermeasures a State must "abstain from any harsh measure which would be contrary to the laws of humanity or the demands of the public conscience".[802] This has been taken further as a result of the development since 1945 of international human rights. In particular the relevant human rights treaties identify certain human rights which may not be derogated from even in time of war or other public emergency.[803]

(7) In its General Comment 8 (1997) the Committee on Economic, Social and Cultural Rights discussed the effect of economic sanctions on civilian populations and especially on children. It dealt both with the effect of measures taken by international organizations, a topic which falls outside the scope of the present Articles,[804] as well as with measures imposed by individual States or groups of States. It stressed that "whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights",[805] and went on to state that:

> "… it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of a country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country."[806]

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[802] *Annuaire de l'Institut de droit international*, vol. 38 (1934), p. 710.

[803] See International Covenant on Civil and Political Rights, art. 4, United Nations, *Treaty Series*, vol. 999, p. 171; European Convention on Human Rights and Fundamental Freedoms, art. 15, United Nations, *Treaty Series*, vol. 213, p. 221; American Convention on Human Rights, art. 27, United Nations, *Treaty Series*, vol. 1144, p. 143.

[804] See article 59 and commentary.

[805] E/C.12/1997/8, 5 December 1997, para. 1.

[806] Ibid., para. 4.

Analogies can be drawn from other elements of general international law. For example, Additional Protocol I of 1977, article 54 (1) stipulates unconditionally that "[s]tarvation of civilians as a method of warfare is prohibited."[807] Likewise, the final sentence of article 1 (2) of the two United Nations Covenants on Human Rights states that "In no case may a people be deprived of its own means of subsistence".[808]

(8) Subparagraph (1) (c) deals with the obligations of humanitarian law with regard to reprisals and is modelled on article 60 (5) of the Vienna Convention on the Law of Treaties.[809] The subparagraph reflects the basic prohibition of reprisals against individuals, which exists in international humanitarian law. In particular, under the 1929 Hague and 1949 Geneva Conventions and Additional Protocol I of 1977, reprisals are prohibited against defined classes of protected persons, and these prohibitions are very widely accepted.[810]

(9) Subparagraph (1) (d) prohibits countermeasures affecting obligations under peremptory norms of general international law. Evidently a peremptory norm, not subject to derogation as between two States even by treaty, cannot be derogated from by unilateral action in the form of countermeasures. Subparagraph (d) reiterates for the purposes of the present chapter the recognition in article 26 that the circumstances precluding wrongfulness elaborated in chapter V

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[807] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), United Nations, *Treaty Series*, vol. 1125, p. 3. See also arts. 54 (2) ("objects indispensable to the survival of the civilian population"), 75. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), United Nations, *Treaty Series*, vol. 1125, p. 609, art. 4.

[808] Art. 1 (2) of the International Covenant on Economic, Social and Cultural Rights, United Nations, *Treaty Series*, vol. 993, p. 3, and art. 1 (2) of the International Covenant on Civil and Political Rights, United Nations, *Treaty Series*, vol. 999, p. 171.

[809] Art. 60 (5) of the Vienna Convention on the Law of Treaties precludes a State from suspending or terminating for material breach any treaty provision "relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties". This paragraph was added at the Vienna Conference on a vote of 88 votes in favour, none against and 7 abstentions.

[810] See K. J. Partsch, "Reprisals", in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (Amsterdam, North Holland, 1986) vol. 4, p. 200, at pp. 203-204; S. Oeter, "Methods and Means of Combat", in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (Oxford, Oxford University Press, 1995) p. 105, at pp. 204-207, paras. 476-479, with references to relevant provisions.

of Part One do not affect the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. The reference to "other" obligations under peremptory norms makes it clear that subparagraph (d) does not qualify the preceding subparagraphs, some of which also encompass norms of a peremptory character. In particular, subparagraphs (b) and (c) stand on their own. Subparagraph (d) allows for the recognition of further peremptory norms creating obligations which may not be the subject of countermeasures by an injured State.[811]

(10) States may agree between themselves on other rules of international law which may not be the subject of countermeasures, whether or not they are regarded as peremptory norms under general international law. This possibility is covered by the *lex specialis* provision in article 55 rather than by the exclusion of countermeasures under article 50 (1) (d). In particular a bilateral or multilateral treaty might renounce the possibility of countermeasures being taken for its breach, or in relation to its subject matter. This is the case, for example, with the European Union treaties, which have their own system of enforcement.[812] Under the dispute settlement system of the WTO, the prior authorization of the Dispute Settlement Body is required before a Member can suspend concessions or other obligations under the WTO agreements in response to a failure of another Member to comply with recommendations and rulings of a WTO panel or the Appellate Body.[813] Pursuant to Article 23 of the WTO Dispute Settlement Understanding (DSU), Members seeking "the redress of a violation of obligations or other nullification or impairment of benefits" under the WTO agreements, "shall have recourse to, and abide by" the DSU rules and procedures. This has been construed both as an "exclusive dispute resolution clause" and as a clause "preventing WTO members from unilaterally resolving their disputes in

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[811] See commentary to article 40, paras. (4) to (6).

[812] On the exclusion of unilateral countermeasures in E.U. law, see, for example, Cases 90 and 91/63, *Commission v. Luxembourg & Belgium* [1964] E.C.R. 625 at p. 631; Case 52/75, *Commission v. Italy* [1976] E.C.R. 277 at p. 284; Case 232/78, *Commission v. France* [1979] E.C.R. 2729; Case C-5/94, *R. v. M.A.F.F., ex parte Hedley Lomas (Ireland) Limited,* [1996] E.C.R. I-2553.

[813] See WTO Dispute Settlement Understanding, arts. 3.7, 22.

respect of WTO rights and obligations".[814] To the extent that derogation clauses or other treaty provisions (e.g. those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are "intransgressible",[815] they may entail the exclusion of countermeasures.

(11) In addition to the substantive limitations on the taking of countermeasures in paragraph 1 of article 50, paragraph 2 provides that countermeasures may not be taken with respect to two categories of obligations, viz. certain obligations under dispute settlement procedures applicable between it and the responsible State, and obligations with respect to diplomatic and consular inviolability. The justification in each case concerns not so much the substantive character of the obligation but its function in relation to the resolution of the dispute between the parties which has given rise to the threat or use of countermeasures.

(12) The first of these, contained in subparagraph (2) (a), applies to "any dispute settlement procedure applicable" between the injured State and the responsible State. This phrase refers only to dispute settlement procedures that are related to the dispute in question and not to other unrelated issues between the States concerned. For this purpose the dispute should be considered as encompassing both the initial dispute over the internationally wrongful act and the question of the legitimacy of the countermeasure(s) taken in response.

(13) It is a well-established principle that dispute settlement provisions must be upheld notwithstanding that they are contained in a treaty which is at the heart of the dispute and the continued validity or effect of which is challenged. As the International Court said in *Appeal Relating to the Jurisdiction of the ICAO Council* ...

> "Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested."[816]

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[814] See *United States - Sections 301-310 of the Trade Act of 1974*, Report of the Panel, 22 December 1999, WTO doc. WT/DS152/R, paras. 7.35-7.46.

[815] To use the synonym adopted by the International Court in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, *I.C.J. Reports 1996*, p. 226, at p. 257, para. 79.

[816] *I.C.J. Reports 1972*, p. 46, at p. 53. See also S.M. Schwebel, *International Arbitration: Three Salient Problems* (Cambridge, Grotius, 1987), pp. 13-59.

Similar reasoning underlies the principle that dispute settlement provisions between the injured and the responsible State and applicable to their dispute may not be suspended by way of countermeasures. Otherwise unilateral action would replace an agreed provision capable of resolving the dispute giving rise to the countermeasures. The point was affirmed by the International Court in the *Diplomatic and Consular Staff* case:

> "In any event, any alleged violation of the Treaty [of Amity] by either party could not have the effect of precluding that party from invoking the provisions of the Treaty concerning pacific settlement of disputes."[817]

(14) The second exception in subparagraph 2 (b) limits the extent to which an injured State may resort by way of countermeasures to conduct inconsistent with its obligations in the field of diplomatic or consular relations. An injured State could envisage action at a number of levels. To declare a diplomat *persona non grata*, to terminate or suspend diplomatic relations, to recall ambassadors in situations provided for in the Convention on Diplomatic Relations such acts do not amount to countermeasures in the sense of this chapter. At a second level, measures may be taken affecting diplomatic or consular privileges, not prejudicing the inviolability of diplomatic or consular personnel or of premises, archives and documents. Such measures may be lawful as countermeasures if the requirements of this chapter are met. On the other hand, the scope of prohibited countermeasures under article 50 (2) (b) is limited to those obligations which are designed to guarantee the physical safety and inviolability (including the jurisdictional immunity) of diplomatic agents, premises, archives and documents in all circumstances, including armed conflict.[818] The same applies, *mutatis mutandis*, to consular officials.

(15) In the *Diplomatic and Consular Staff* case, the International Court stressed that "diplomatic law itself provides the necessary means of defence against, and sanction for, illicit

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[817] *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at p. 28, para. 53.

[818] See, e.g. Vienna Convention on Diplomatic Relations, United Nations, *Treaty Series*, vol. 500, p. 95, arts. 22, 24, 29, 44, 45.

activities by members of diplomatic or consular missions",[819] and it concluded that violations of diplomatic or consular immunities could not be justified even as countermeasures in response to an internationally wrongful act by the sending State. As the Court said:

> "The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse."[820]

If diplomatic or consular personnel could be targeted by way of countermeasures, they would in effect constitute resident hostages against perceived wrongs of the sending State, undermining the institution of diplomatic and consular relations. The exclusion of any countermeasures infringing diplomatic and consular inviolability is thus justified on functional grounds. It does not affect the various avenues for redress available to the receiving State under the terms of the Vienna Conventions of 1961 and 1963.[821] On the other hand no reference need be made in article 50 (2) (b) to multilateral diplomacy. The representatives of States to international organizations are covered by the reference to diplomatic agents. As for officials of international organizations themselves, no retaliatory step taken by a host State to their detriment could qualify as a countermeasure since it would involve non-compliance not with an obligation owed to the responsible State but with an obligation owed to a third party, i.e. the international organization concerned.

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[819] *I.C.J. Reports 1980*, p. 3, at p. 38, para. 83.

[820] Ibid., at p. 40, para. 86. Cf. Vienna Convention on Diplomatic Relations, art. 45 (a); Vienna Convention on Consular Relations, United Nations, *Treaty Series*, vol. 596, p. 261, art. 27 (1) (a) (premises, property and archives to be protected "even in case of armed conflict").

[821] See Vienna Convention on Diplomatic Relations, arts. 9, 11, 26, 36 (2), 43 (b), 47 (2) (a); Vienna Convention on Consular Relations, arts. 10 (2), 12, 23, 25 (b), (c), 35 (3).

Article 51

Proportionality

> Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Commentary

(1) Article 51 establishes an essential limit on the taking of countermeasures by an injured State in any given case, based on considerations of proportionality. It is relevant in determining what countermeasures may be applied and their degree of intensity. Proportionality provides a measure of assurance inasmuch as disproportionate countermeasures could give rise to responsibility on the part of the State taking such measures.

(2) Proportionality is a well-established requirement for taking countermeasures, being widely recognized in State practice, doctrine and jurisprudence. According to the award in the *"Naulilaa"* case ...

> "even if one were to admit that the law of nations does not require that the reprisal should be approximately in keeping with the offence, one should certainly consider as excessive and therefore unlawful reprisals out of all proportion to the act motivating them."[822]

(3) In the *Air Services* arbitration,[823] the issue of proportionality was examined in some detail. In that case there was no exact equivalence between France's refusal to allow a change of gauge in London on flights from the west coast of the United States and the United States' countermeasure which suspended Air France flights to Los Angeles altogether. The Tribunal

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[822] *"Naulilaa" (Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa), UNRIAA*, vol. II, p. 1013 (1928), at p. 1028.

[823] *Air Services Agreement of 27 March 1946 (United States v. France)*, ibid., vol. XVIII, p. 417 (1978).

nonetheless held the United States measures to be in conformity with the principle of proportionality because they "do not appear to be clearly disproportionate when compared to those taken by France".[824] In particular the majority said:

> "It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach: this is a well-known rule … It has been observed, generally, that judging the 'proportionality' of counter-measures is not an easy task and can at best be accomplished by approximation. In the Tribunal's view, it is essential, in a dispute between States, to take into account not only the injuries suffered by the companies concerned but also the importance of the questions of principle arising from the alleged breach. The Tribunal thinks that it will not suffice, in the present case, to compare the losses suffered by Pan Am on account of the suspension of the projected services with the losses which the French companies would have suffered as a result of the counter-measures; it will also be necessary to take into account the importance of the positions of principle which were taken when the French authorities prohibited changes of gauge in third countries. If the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France. Neither Party has provided the Tribunal with evidence that would be sufficient to affirm or reject the existence of proportionality in these terms, and the Tribunal must be satisfied with a very approximative appreciation."[825]

In that case the countermeasures taken were in the same field as the initial measures and concerned the same routes, even if they were rather more severe in terms of their economic effect on the French carriers than the initial French action.

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[824] Ibid., at p. 444, para. 83.

[825] Ibid. M. Reuter, dissenting, accepted the Tribunal's legal analysis of proportionality but suggested that there were "serious doubts on the proportionality of the counter-measures taken by the United States, which the Tribunal has been unable to assess definitively". Ibid., at p. 448.

(4) The question of proportionality was again central to the appreciation of the legality of possible countermeasures taken by Czechoslovakia in the *Gabčíkovo-Nagymaros Project* case.[826] The International Court, having accepted that Hungary's actions in refusing to complete the Project amounted to an unjustified breach of the 1977 Agreement, went on to say:

> "In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question. In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:
>
> > '[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others'...
>
> Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well ...
>
> The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube - with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz - failed to respect the proportionality which is required by international law... The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate."[827]

Thus the Court took into account the quality or character of the rights in question as a matter of principle and (like the Tribunal in the *Air Services* case) did not assess the question of proportionality only in quantitative terms.

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[826] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997*, p. 7.

[827] Ibid., at p. 56, paras. 85, 87, citing *Territorial Jurisdiction of the International Commission of the River Oder, 1929, P.C.I.J., Series A, No. 23*, p. 27.

(5) In other areas of the law where proportionality is relevant (e.g. self-defence), it is normal to express the requirement in positive terms, even though, in those areas as well, what is proportionate is not a matter which can be determined precisely.[828] The positive formulation of the proportionality requirement is adopted in article 51. A negative formulation might allow too much latitude, in a context where there is concern as to the possible abuse of countermeasures.

(6) Considering the need to ensure that the adoption of countermeasures does not lead to inequitable results, proportionality must be assessed taking into account not only the purely "quantitative" element of the injury suffered, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Article 51 relates proportionality primarily to the injury suffered but "taking into account" two further criteria: the gravity of the internationally wrongful act, and the rights in question. The reference to "the rights in question" has a broad meaning, and includes not only the effect of a wrongful act on the injured State but also on the rights of the responsible State. Furthermore, the position of other States which may be affected may also be taken into consideration.

(7) Proportionality is concerned with the relationship between the internationally wrongful act and the countermeasure. In some respects proportionality is linked to the requirement of purpose specified in article 49: a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in article 49. Proportionality is, however, a limitation even on measures which may be justified under article 49. In every case a countermeasure must be commensurate with the injury suffered, including the importance of the issue of principle involved and this has a function partly independent of the question whether the countermeasure was necessary to achieve the result of ensuring compliance.

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[828] E. Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale (Giuffré, Milan, 2000).*

Article 52

Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(*a*) Call on the responsible State, in accordance with article 43, to fulfil its obligations under Part Two;

(*b*) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(*a*) The internationally wrongful act has ceased, and

(*b*) The dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Commentary

(1) Article 52 lays down certain procedural conditions relating to the resort to countermeasures by the injured State. Before taking countermeasures an injured State is required to call on the responsible State in accordance with article 43 to comply with its obligations under Part Two. The injured State is also required to notify the responsible State that it intends to take countermeasures and to offer to negotiate with that State. Notwithstanding this second requirement, the injured State may take certain urgent countermeasures to preserve its rights. If the responsible State has ceased the internationally wrongful act and the dispute is before a competent court or tribunal, countermeasures may not be taken; if already taken, they must be suspended. However this requirement does not apply if the responsible State fails to implement dispute settlement procedures in good faith. In such a case countermeasures do not have to be suspended and may be resumed.

(2) Overall, article 52 seeks to establish reasonable procedural conditions for the taking of countermeasures in a context where compulsory third party settlement of disputes may not be available, immediately or at all.[829] At the same time it needs to take into account the possibility that there may be an international court or tribunal with authority to make decisions binding on the parties in relation to the dispute. Countermeasures are a form of self-help, which responds to the position of the injured State in an international system in which the impartial settlement of disputes through due process of law is not yet guaranteed. Where a third party procedure exists and has been invoked by either party to the dispute, the requirements of that procedure, e.g. as to interim measures of protection, should substitute as far as possible for countermeasures. On the other hand, even where an international court or tribunal has jurisdiction over a dispute and authority to indicate interim measures of protection, it may be that the responsible State is not cooperating in that process. In such cases the remedy of countermeasures necessarily revives.

(3) The system of article 52 builds upon the observations of the Tribunal in the *Air Services* arbitration.[830] The first requirement, set out in subparagraph (1) (a), is that the injured State must call on the responsible State to fulfil its obligations of cessation and reparation before any resort to countermeasures. This requirement (sometimes referred to as "*sommation*") was stressed both by the Tribunal in the *Air Services* arbitration[831] and by the International Court in the *Gabčíkovo-Nagymaros Project* case.[832] It also appears to reflect a general practice.[833]

(4) The principle underlying the notification requirement is that, considering the exceptional nature and potentially serious consequences of countermeasures, they should not be taken before the other State is given notice of a claim and some opportunity to present a response. In practice, however, there are usually quite extensive and detailed negotiations over a dispute before the

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[829] See above, introduction to this chapter, para. (7).

[830] *Air Services Agreement of 27 March 1946 (United States v. France), UNRIAA.*, vol. XVIII, p. 417 (1978), at pp. 445-446, paras. 91, 94-96.

[831] Ibid., at p. 444, paras. 85-7.

[832] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997,* p. 7, at p. 56, para. 84.

[833] A. Gianelli, *Adempimenti preventivi all'adozione di contromisure internazionali (Giuffré, Milan, 2000).*

point is reached where some countermeasures are contemplated. In such cases the injured State will already have notified the responsible State of its claim in accordance with article 43, and it will not have to do it again in order to comply with subparagraph 1 (a).

(5) Subparagraph 1 (b) requires that the injured State which decides to take countermeasures should notify the responsible State of that decision to take countermeasures and offer to negotiate with that State. Countermeasures can have serious consequences for the target State, which should have the opportunity to reconsider its position faced with the proposed countermeasures. The temporal relationship between the operation of subparagraphs 1 (a) and 1 (b) is not strict. Notifications could be made close to each other or even at the same time.

(6) Under paragraph 2, however, the injured State may take "such urgent countermeasures as are necessary to preserve its rights" even before any notification of the intention to do so. Under modern conditions of communications, a State which is responsible for an internationally wrongful act and which refuses to cease that act or provide any redress therefor may also seek to immunize itself from countermeasures, for example by withdrawing assets from banks in the injured State. Such steps can be taken within a very short time, so that the notification required by subparagraph (1) (b) might frustrate its own purpose. Hence paragraph 2 allows for urgent countermeasures which are necessary to preserve the rights of the injured State: this phrase includes both its rights in the subject-matter of the dispute and its right to take countermeasures. Temporary stay orders, the temporary freezing of assets and similar measures could fall within paragraph 2, depending on the circumstances.

(7) Paragraph 3 deals with the case in which the wrongful act has ceased and the dispute is submitted to a court or tribunal which has the authority to decide it with binding effect for the parties. In such a case, and for so long as the dispute settlement procedure is being implemented in good faith, unilateral action by way of countermeasures is not justified. Once the conditions in paragraph 3 are met the injured State may not take countermeasures; if already taken, they must be suspended "without undue delay". The phrase "without undue delay" allows a limited tolerance for the arrangements required to suspend the measures in question.

(8) A dispute is not "pending before a court or tribunal" for the purposes of subparagraph 3 (b) unless the court or tribunal exists and is in a position to deal with the case. For these purposes a dispute is not pending before an ad hoc tribunal established pursuant to a treaty until the tribunal is actually constituted, a process which will take some time even if both

parties are cooperating in the appointment of the members of the tribunal.[834] Paragraph 3 is based on the assumption that the court or tribunal to which it refers has jurisdiction over the dispute and also the power to order provisional measures. Such power is a normal feature of the rules of international courts and tribunals.[835] The rationale behind paragraph 3 is that once the parties submit their dispute to such a court or tribunal for resolution, the injured State may request it to order provisional measures to protect its rights. Such a request, provided the court or tribunal is available to hear it, will perform a function essentially equivalent to that of countermeasures. Provided the order is complied with it will make countermeasures unnecessary pending the decision of the tribunal. The reference to a "court or tribunal" is intended to refer to any third party dispute settlement procedure, whatever its designation. It does not, however, refer to political organs such as the Security Council. Nor does it refer to a tribunal with jurisdiction between a private party and the responsible State, even if the dispute between them has given rise to the controversy between the injured State and the responsible State. In such cases, however, the fact that the underlying dispute has been submitted to arbitration will be relevant for the purposes of articles 49 and 51, and only in exceptional cases will countermeasures be justified.[836]

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[834] Hence art. 290 (5) of the United Nations Convention on the Law of the Sea (Montego Bay, United Nations, *Treaty Series,* vol. 1833, p. 396) provides for the International Tribunal on the Law of the Sea to deal with provisional measures requests "[p]ending the constitution of an arbitral tribunal to which the dispute is being submitted".

[835] The binding effect of provisional measures orders under Part XI of the 1982 Convention is assured by art. 290 (6). For the binding effect of provisional measures orders under art. 41 of the Statute of the International Court of Justice see the decision in *LaGrand (Germany v. United States of America), Merits*, judgment of 27 June 2001, paras. 99-104.

[836] Under the Washington Convention of 1965, the State of nationality may not bring an international claim of behalf of a claimant individual or company "in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such a dispute": Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, United Nations, *Treaty Series*, vol. 575, p. 159., art. 27 (1); C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) pp. 397-414. This excludes all forms of invocation of responsibility by the State of nationality, including the taking of countermeasures. See commentary to article 42, para. (2).

(9) Paragraph 4 of article 52 provides a further condition for the suspension of countermeasures under paragraph 3. It comprehends various possibilities, ranging from an initial refusal to cooperate in the procedure, for example by non-appearance, through non-compliance with a provisional measures order, whether or not it is formally binding, through to refusal to accept the final decision of the court or tribunal. This paragraph also applies to situations where a State party fails to cooperate in the establishment of the relevant tribunal or fails to appear before the tribunal once it is established. Under the circumstances of paragraph 4, the limitations to the taking of countermeasures under paragraph 3 do not apply.

Article 53

Termination of countermeasures

> Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act.

Commentary

(1) Article 53 deals with the situation where the responsible State has complied with its obligations of cessation and reparation under Part Two in response to countermeasures taken by the injured State. Once the responsible State has complied with its obligations under Part Two, no ground is left for maintaining countermeasures, and they must be terminated forthwith.

(2) The notion that countermeasures must be terminated as soon as the conditions which justified them have ceased is implicit in the other articles in this chapter. In view of its importance, however, article 53 makes this clear. It underlines the specific character of countermeasures under article 49.

Article 54

Measures taken by States other than an injured State

> This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Commentary

(1) Chapter II deals with the right of an injured State to take countermeasures against a responsible State in order to induce that State to comply with its obligations of cessation and reparation. However, "injured" States, as defined in article 42 are not the only States entitled to invoke the responsibility of a State for an internationally wrongful act under chapter I of this Part. Article 48 allows such invocation by any State, in the case of the breach of an obligation to the international community as a whole, or by any member of a group of States, in the case of other obligations established for the protection of the collective interest of the group. By virtue of article 48 (2), such States may also demand cessation and performance in the interests of the beneficiaries of the obligation breached. Thus with respect to the obligations referred to in article 48, such States are recognized as having a legal interest in compliance. The question is to what extent these States may legitimately assert a right to react against unremedied breaches.[837]

(2) It is vital for this purpose to distinguish between individual measures, whether taken by one State or by a group of States each acting in its individual capacity and through its own organs on the one hand, and institutional reactions in the framework of international organisations on the other. The latter situation, for example where it occurs under the authority of Chapter VII of the United Nations Charter, is not covered by the Articles.[838] More generally the Articles do not cover the case where action is taken by an international organization, even though the member States may direct or control its conduct.[839]

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[837] See e.g., M. Akehurst, "Reprisals by Third States", *B.Y.I.L.*, vol. 44 (1970), p. 1; J.I. Charney, "Third State Remedies in International Law", *Michigan Journal of International Law*, vol. 10 (1988), p. 57; D.N. Hutchinson, "Solidarity and Breaches of Multilateral Treaties", *B.Y.I.L.*, vol. 59 (1988), p. 151; L.-A. Sicilianos, *Les réactions décentralisées à l'illicite* (Paris, LDGJ, 1990), pp. 110-175; B. Simma, "From Bilateralism to Community Interest in International Law", *Recueil des cours*, vol. 250 (1994-VI), p. 217; J.A. Frowein, "Reactions by Not Directly Affected States to Breaches of Public International Law", *Recueil des cours*, vol. 248 (1994–IV), p. 345.

[838] See article 59 and commentary.

[839] See article 57 and commentary.

(3) Practice on this subject is limited and rather embryonic. In a number of instances, States have reacted against what were alleged to be breaches of the obligations referred to in article 48 without claiming to be individually injured. Reactions have taken such forms as economic sanctions or other measures (e.g. breaking off air links or other contacts). Examples include the following:

- *USA - Uganda (1978).* In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda.[840] The legislation recited that "[t]he Government of Uganda… has committed genocide against Ugandans" and that the "United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide".[841]
- *Certain western countries - Poland and Soviet Union (1981).* On 13 December 1981, the Polish government imposed martial law and subsequently suppressed demonstrations and interned many dissidents.[842] The United States and other western countries took action against both Poland and the Soviet Union. The measures included the suspension, with immediate effect, of treaties providing for landing rights of Aeroflot in the United States and LOT in the United States, Great Britain, France, the Netherlands, Switzerland and Austria.[843] The suspension procedures provided for in the respective treaties were disregarded.[844]
- *Collective measures against Argentina (1982).* In April 1982, when Argentina took control over part of the Falkland Islands (Malvinas), the Security Council called for an immediate withdrawal.[845] Following a request by the United Kingdom,

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[840] Uganda Embargo Act, 22 USC s. 2151 (1978).

[841] Ibid., sections. 5c, 5d.

[842] *R.G.D.I.P.*, vol. 86 (1982), pp. 603-604.

[843] Ibid., p. 607.

[844] See e.g. art. XV of the US-Polish agreement of 1972, 23 U.S.T. 4269; art. XVII of the US-Soviet agreement of 1967, *I.L.M.*, vol. 6, (1967), p. 82; *I.L.M.*, vol. 7 (1968), p. 571.

[845] S.C. Res. 502 (1982), 3 April 1982.

E.C. members, Australia, New Zealand and Canada adopted trade sanctions. These included a temporary prohibition on all imports of Argentine products, which ran contrary to article XI:1 and possibly article III of the GATT. It was disputed whether the measures could be justified under the national security exception provided for in article XXI (b) (iii) of the GATT.[846] The embargo adopted by the European countries also constituted a suspension of Argentina's rights under two sectoral agreements on trade in textiles and trade in mutton and lamb,[847] for which security exceptions of GATT did not apply.

- *USA - South Africa (1986).* When in 1985, the South African government declared a state of emergency in large parts of the country, the UN Security Council recommended the adoption of sectoral economic boycotts and the freezing of cultural and sports relations.[848] Subsequently, some countries introduced measures which went beyond those recommended by the Security Council. The United States Congress adopted the Comprehensive Anti-Apartheid Act which suspended landing rights of South African Airlines on US territory.[849] This immediate suspension was contrary to the terms of the 1947 US-South African Aviation Agreement[850] and was justified as a measure which should encourage the South African government "to adopt measures leading towards the establishment of a non-racial democracy".[851]

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[846] Western States' reliance on this provision was disputed by other GATT members, cf. Communiqué of western countries, GATT doc. L. 5319/Rev.1 and the statements by Spain and Brasil, GATT doc. C/M/157, pp. 5-6. For an analysis see H. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (Berlin, Springer, 1996), pp. 328-34.

[847] The treaties are reproduced in *O.J.E.C.* 1979 L 298, p. 2; *O.J.E.C.*, 1980 L 275, p. 14.

[848] S.C. Res. 569 (1985), 26 July 1985. For further references see L-A. Sicilianos, *Les réactions décentralisées à l'illicite* (Paris, L.D.G.J., 1990), p. 165.

[849] For the text of this provision see *I.L.M.*, vol. 26 (1987), p. 79, (s. 306).

[850] United Nations, *Treaty Series*, vol. 66, p. 233, art. VI.

[851] For the implementation order, see *I.L.M.*, vol. 26 (1987), p. 105.

- *Collective measures against Iraq (1990).* On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The United Nations Security Council immediately condemned the invasion. E.C. member States and the United States adopted trade embargos and decided to freeze Iraqi assets.[852] This action was taken in direct response to the Iraqi invasion with the consent of the Government of Kuwait.
- *Collective measures against Yugoslavia (1998).* In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban.[853] For a number of countries, such as Germany, France and the United Kingdom, the latter measure implied the non-performance of bilateral aviation agreements.[854] Because of doubts about the legitimacy of the action, the British government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect. Justifying the measure, it stated that "President Milosevic's ... worsening record on human rights, means that, on moral and political grounds, he has forfeited the right of his Government to insist on the 12 months notice which would normally apply."[855] The Federal Republic of Yugoslavia protested these measures as "unlawful, unilateral and an example of the policy of discrimination".[856]

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[852] See e.g. President Bush's Executive Orders of 2 August 1990, reproduced in *A.J.I.L.*, vol. 84 (1990), p. 903.

[853] Common positions of 7 May and 29 June 1998, *O.J.E.C.* 1998, L 143 (p. 1) and L 190 (p. 3); implemented through EC Regulations 1295/98 (L 178, p. 33) & 1901/98 (L 248, p. 1).

[854] See e.g. *U.K.T.S.* 1960, No. 10; *R.T.A.F.* 1967, No. 69.

[855] See *B.Y.I.L.*, vol. 69 (1998), pp. 580-1; *B.Y.I.L.*, vol. 70 (1999), pp. 555-6.

[856] Statement of the Government of the Federal Republic of Yugoslavia on the Suspension of Flights of Yugoslav Airlines, 10 October 1999: S/1999/216.

(4) In some other cases, certain States similarly suspended treaty rights in order to exercise pressure on States violating collective obligations. However, they did not rely on a right to take countermeasures but asserted a right to suspend the treaty because of a fundamental change of circumstances. Two examples may be given:

- *Netherlands - Surinam (1982).* In 1980, a military government seized power in Surinam. In response to a crackdown by the new government on opposition movements in December 1982, the Dutch government suspended a bilateral treaty on development assistance under which Surinam was entitled to financial subsidies.[857] While the treaty itself did not contain any suspension or termination clauses, the Dutch government stated that the human rights violations in Surinam constituted a fundamental change of circumstances which gave rise to a right of suspension.[858]
- *E.C. Member States - Yugoslavia (1991).* In the autumn of 1991, in response to resumption of fighting within Yugoslavia, EC members suspended and later denounced the 1983 Co-operation Agreement with Yugoslavia.[859] This led to a general repeal of trade preferences on imports and thus went beyond the weapons embargo ordered by the Security Council in Resolution 713 of 25 September 1991. The reaction was incompatible with the terms of the Co-operation Agreement, which did not provide for the immediate suspension but only for denunciation upon six months' notice. Justifying the suspension, EC member States explicitly mentioned the threat to peace and security in the region. But as in the case of Surinam, they relied on fundamental change of circumstances, rather than asserting a right to take countermeasures.[860]

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[857] *Tractatenblad* 1975, No. 140. See H.-H. Lindemann, "Die Auswirkungen der Menschenrechtsverletzungen auf die Vertragsbeziehungen zwischen den Niederlanden und Surinam", *Z.a.ö.R.V.*, vol. 44 (1984), p. 64 at pp. 68-69.

[858] P. Siekmann, "Netherlands State Practice for the Parliamentary Year 1982-1983", *Netherlands Yearbook of International Law*, vol. 15 (1984), p. 321.

[859] *O.J.E.C.* 1983 L 41, p. 1. See *O.J.E.C.* 1991 L 315, p. 1, for the suspension, and L 325, p. 23, for the denunciation.

[860] See also the decision of the European Court of Justice: Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, [1998] E.C.R. I-3655, at pp. 3706–3708, paras. 53-59.

(5) In some cases, there has been an apparent willingness on the part of some States to respond to violations of obligations involving some general interest, where those States could not be considered "injured States" in the sense of article 42. It should be noted that in those cases where there was, identifiably, a State primarily injured by the breach in question, other States have acted at the request and on behalf of that State.[861]

(6) As this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest. Consequently it is not appropriate to include in the present Articles a provision concerning the question whether other States, identified in article 48, are permitted to take countermeasures in order to induce a responsible State to comply with its obligations. Instead chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law.

(7) Article 54 accordingly provides that the chapter on countermeasures does not prejudice the right of any State, entitled under article 48 (1) to invoke the responsibility of another State, to take lawful measures against the responsible State to ensure cessation of the breach and reparation in the interest of the injured State or the beneficiaries of the obligation breached. The Article speaks of "lawful measures" rather than "countermeasures" so as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole.

PART FOUR

GENERAL PROVISIONS

This Part contains a number of general provisions applicable to the Articles as a whole, specifying either their scope or certain matters not dealt with. First, article 55 makes it clear by reference to the *lex specialis* principle that the Articles have a residual character. Where some matter otherwise dealt with in the Articles is governed by a special rule of international law, the latter will prevail to the extent of any inconsistency. Correlatively, article 56 makes it clear that the Articles are not exhaustive, and that they do not affect other applicable rules of international law on matters not dealt with. There follow three saving clauses. Article 57 excludes from the scope of the Articles questions concerning the responsibility of international organizations and of States for the acts of international organizations. The Articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State, and this is made clear by article 58. Finally, article 59 reserves the effects of the United Nations Charter itself.

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[861] Cf. *Military and Paramilitary Activities* where the International Court noted that action by way of collective self-defence could not be taken by a third State except at the request of the State subjected to the armed attack: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986*, p. 14, at p. 105, para. 199.

Article 55

Lex specialis

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Commentary

(1) When defining the primary obligations that apply between them, States often make special provision for the legal consequences of breaches of those obligations, and even for determining whether there has been such a breach. The question then is whether those provisions are exclusive, i.e. whether the consequences which would otherwise apply under general international law, or the rules that might otherwise have applied for determining a breach, are thereby excluded. A treaty may expressly provide for its relationship with other rules. Often, however, it will not do so and the question will then arise whether the specific provision is to coexist with or exclude the general rule that would otherwise apply.

(2) Article 55 provides that the Articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law. It reflects the maxim *lex specialis derogat legi generali*. Although it may provide an important indication, this is only one of a number of possible approaches towards determining which of several rules potentially applicable is to prevail or whether the rules simply coexist. Another gives priority, as between the parties, to the

rule which is later in time.[862] In certain cases the consequences that follow from a breach of some overriding rule may themselves have a peremptory character. For example States cannot, even as between themselves, provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law. Thus the assumption of article 55 is that the special rules in question have at least the same legal rank as those expressed in the Articles. On that basis, article 55 makes it clear that the present articles operate in a residual way.

(3) It will depend on the special rule to establish the extent to which the more general rules on State responsibility set out in the present articles are displaced by that rule. In some cases it will be clear from the language of a treaty or other text that only the consequences specified are to flow. Where that is so, the consequence will be "determined" by the special rule and the principle embodied in article 56 will apply. In other cases, one aspect of the general law may be modified, leaving other aspects still applicable. An example of the former is the World Trade Organization Dispute Settlement Understanding as it relates to certain remedies.[863] An example of the latter is article 41 of the European Convention on Human Rights.[864] Both concern matters dealt with in Part Two of the Articles. The same considerations apply to Part One. Thus a particular treaty might impose obligations on a State but define the "State" for that purpose in a

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[862] See Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 30 (3).

[863] Agreement establishing the World Trade Organization, Marrakesh, United Nations, *Treaty Series*, vol. 1867, p. 3, Annex 2, Understanding on Rules and Procedures governing the Settlement of Disputes, esp. art. 3 (7), which provides for compensation "only if the immediate withdrawal of the measure is impractical and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement". For WTO purposes, "compensation" refers to the future conduct, not past conduct and involves a form of countermeasure. See art. 22. On the distinction between cessation and reparation for WTO purposes see e.g. *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, Panel Report, 21 January 2000, WT/DS126/RW, para. 6.49.

[864] See commentary to article 32, paragraph (2).

way which produces different consequences than would otherwise flow from the rules of attribution in chapter II.[865] Or a treaty might exclude a State from relying on *force majeure* or necessity.

(4) For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus the question is essentially one of interpretation. For example in the *Neumeister* case, the European Court of Human Rights held that the specific obligation in article 5 (5) of the European Convention for compensation for unlawful arrest or detention did not prevail over the more general provision for compensation in article 50. In the Court's view, to have applied the *lex specialis* principle to article 5 (5) would have led to "consequences incompatible with the aim and object of the treaty".[866] It was sufficient, in applying article 50, to take account of the specific provision.[867]

(5) Article 55 is designed to cover both "strong" forms of *lex specialis*, including what are often referred to as self-contained regimes, as well as "weaker" forms such as specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution. The Permanent Court of International Justice referred to the notion of a self-contained regime in

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[865] Thus article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, *Treaty Series,* vol. 1465, p. 112, only applies to torture committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". This is probably narrower than the bases for attribution of conduct to the State in Part One, chapter II. Cf. "federal" clauses, allowing certain component units of the State to be excluded from the scope of a treaty or limiting obligations of the federal State with respect to such units, e.g. UNESCO Convention for the Protection of the World Cultural and Natural Heritage, United Nations, *Treaty Series,* vol. 1037, p. 151, art. 34.

[866] *E.C.H.R., Series A, No. 17* (1974), p. 13, para. 29; see also ibid., pp. 12-14, paras. 28-31.

[867] See also *Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A, No. 2*, at pp. 29-33; *Colleanu v. German State*, (1929), *Recueil des tribunals arbitraux mixtes*, vol. IX, p. 216; WTO, *Turkey - Restrictions on Imports of Textile and Clothing Products*, Panel Report, 31 May 1999, WT/DS34/R, paras. 9.87-9.95; *Beagle Channel Arbitration (Argentina v. Chile), UNRIAA*, vol. XXI, p. 53 (1977), at p. 100, para. 39. See further C.W. Jenks, "The Conflict of Law-Making Treaties", *B.Y.I.L.*, vol. 30 (1953), p. 401; M. McDougal, H. Lasswell & J. Miller, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (New Haven, New Haven Press, 1994), pp. 200-206; P. Reuter, *Introduction au Droit des Traités* (3rd edn.) (Paris, Presses Universitaires de France, 1995), para. 201.

The S.S. Wimbledon with respect to the transit provisions concerning the Kiel Canal in the Treaty of Versailles,[868] as did the International Court of Justice in the *Diplomatic and Consular Staff* case with respect to remedies for abuse of diplomatic and consular privileges.[869]

(6) The principle stated in article 55 applies to the Articles as a whole. This point is made clear by the use of language ("the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State") which reflects the content of each of Parts One, Two and Three.

Article 56

Questions of State responsibility not regulated by these articles

> The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Commentary

(1) The present Articles set out by way of codification and progressive development the general secondary rules of State responsibility. In that context, article 56 has two functions. First, it preserves the application of the rules of customary international law concerning State responsibility on matters not covered by the Articles. Secondly, it preserves other rules concerning the effects of a breach of an international obligation which do not involve issues of State responsibility but stem from the law of treaties or other areas of international law. It complements the *lex specialis* principle stated in article 55. Like article 55, it is not limited to the legal consequences of wrongful acts but applies to the whole regime of State responsibility set out in the Articles.

(2) As to the first of these functions, the Articles do not purport to state all the consequences of an internationally wrongful act even under existing international law and there is no intention of precluding the further development of the law on State responsibility. For example the principle of law expressed in the maxim *ex injuria jus non oritur* may generate new legal

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[868] *1923, P.C.I.J., Series A, No. 1*, at pp. 23-24.

[869] *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at p. 40, para. 86. See commentary to article 50, para. (15), and see also B. Simma, "Self-Contained Regimes", *Netherlands Yearbook of International Law*, vol. 16 (1985), p. 111.

consequences in the field of responsibility.[870] In this respect article 56 mirrors the preambular paragraph of the Vienna Convention on the Law of Treaties which affirms that "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". However matters of State responsibility are not only regulated by customary international law but also by some treaties; hence article 56 refers to the "applicable rules of international law".

(3) A second function served by article 56 is to make it clear that present Articles are not concerned with any legal effects of a breach of an international obligation which do not flow from the rules of State responsibility, but stem from the law of treaties or other areas of law. Examples include the invalidity of a treaty procured by an unlawful use of force,[871] the exclusion of reliance on a fundamental change of circumstances where the change in question results from a breach of an international obligation of the invoking State to any other State party,[872] or the termination of the international obligation violated in the case of a material breach of a bilateral treaty.[873]

Article 57

Responsibility of an international organization

> These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

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[870] Another possible example, related to the determination whether there has been a breach of an international obligation, is the so-called principle of "approximate application", formulated by Sir Hersch Lauterpacht in *Admissibility of Hearings of Petitioners by the Committee on South West Africa, I.C.J. Reports 1956*, p. 23, at p. 46. In the *Gabčikovo-Nagymaros Project* case, the International Court said that "even if such a principle existed, it could by definition only be employed within the limits of the treaty in question": *Gabčikovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997*, p. 7, at p. 53, para. 76. See further S. Rosenne, *Breach of Treaty* (Grotius, Cambridge, 1985) pp. 96-101.

[871] Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331, art. 52.

[872] Ibid., art. 62 (2) (b).

[873] Ibid., art. 60 (1).

Commentary

(1) Article 57 is a saving clause which reserves two related issues from the scope of the Articles. These concern, first, any question involving the responsibility of international organizations, and second, any question concerning the responsibility of any State for the conduct of an international organization.

(2) In accordance with the articles prepared by the Commission on other topics, the expression "international organization" means an "intergovernmental organization".[874] Such an organization possesses separate legal personality under international law,[875] and is responsible for its own acts, i.e., for acts which are carried out by the organization through its own organs or officials.[876] By contrast, where a number of States act together through their own organs as distinct from those of an international organization, the conduct in question is that of the States concerned, in accordance with the principles set out in chapter II of Part One. In such cases, as article 47 confirms, each State remains responsible for its own conduct.

(3) Just as a State may second officials to another State, putting them at its disposal so that they act for the purposes of and under the control of the latter, so the same could occur as between an international organization and a State. The former situation is covered by article 6. As to the latter situation, if a State seconds officials to an international organization so that they act as organs or officials of the organization, their conduct will be attributable to the organization, not the sending State, and will fall outside the scope of the Articles. As to the

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[874] See Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, art. 2 (1) (i).

[875] A firm foundation for the international personality of the United Nations is laid in the International Court's advisory opinion in *Reparation for Injuries Suffered in the Service of the United Nations, I.C.J. Reports 1949*, p. 174, at p. 179.

[876] As the International Court has observed, "the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts". *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, I.C.J. Reports 1999*, p. 62, at pp. 88-89, para. 66.

converse situation, in practice there do not seem to be convincing examples of organs of international organizations which have been "placed at the disposal of" a State in the sense of article 6,[877] and there is no need to provide expressly for the possibility.

(4) Article 57 also excludes from the scope of the Articles issues of the responsibility of a State for the acts of an international organization, i.e., those cases where the international organization is the actor and the State is said to be responsible by virtue of its involvement in the conduct of the organization or by virtue of its membership of the organization. Formally such issues could fall within the scope of the present Articles since they concern questions of State responsibility akin to those dealt with in chapter IV of Part One. But they raise controversial substantive questions as to the functioning of international organizations and the relations between their members, questions which are better dealt with in the context of the law of international organizations.[878]

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[877] Cf. *Yearbook ... 1974*, vol. II, pp. 286-290. The High Commissioner for the Free City of Danzig was appointed by the League of Nations Council and was responsible to it; see *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, 1932, P.C.I.J., Series A/B, No. 44*, p. 4. Although the High Commission exercised powers in relation to Danzig, it is doubtful that he was placed at the disposal of Danzig within the meaning of article 6. The position of the High Representative, appointed pursuant to Annex 10 of the General Framework Agreement for Peace in Bosnia-Herzegovina of 14 December 1995, is also unclear. The Constitutional Court of Bosnia-Herzegovina has held that the High Representative has a dual role, both as an international agent and as a official in certain circumstances acting in and for Bosnia-Herzegovina; in the latter respect, the High Representative's acts are subject to constitutional control. See *Case U 9/100 Regarding the Law on the State Border Service*, judgment of 3 November 2000.

[878] This area of international law has acquired significance following controversies, *inter alia*, over the International Tin Council: *J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry* [1990] 2 A.C. 418 (England, House of Lords); Case 241/87 *Maclaine Watson & Co Ltd. v. Council and Commission of the European Communities* [1990] E.C.R. I-1797 (E.C.J.)) and the Arab Organization for Industrialization (*Westland Helicopters Ltd. v. Arab Organization for Industrialization,* (1985), *I.L.R.*, vol. 80, p. 595 (I.C.C. Award); *Arab Organization for Industrialization v. Westland Helicopters Ltd.*, (1987) *I.L.R.*, vol. 80, p. 622 (Switzerland, Federal Supreme Court); *Westland Helicopters Ltd. v. Arab Organization for Industrialization,* (1994) *I.L.R.* vol. 108, p. 564 (England, High Court). See also *Waite and Kennedy v. Germany, E.C.H.R. Reports* 1999-I, p. 393.

(5) On the other hand article 57 does not exclude from the scope of the Articles any question of the responsibility of a State for its own conduct, i.e., for conduct attributable to it under chapter II of Part One, not being conduct performed by an organ of an international organization. In this respect the scope of article 57 is narrow. It covers only what is sometimes referred to as the derivative or secondary liability of member States for the acts or debts of an international organization.[879]

Article 58

Individual responsibility

> These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Commentary

(1) Article 58 makes clear that the Articles as a whole do not address any question of the individual responsibility under international law of any person acting on behalf of a State. It clarifies a matter which could be inferred in any case from the fact that the Articles only address issues relating to the responsibility of States.

(2) The principle that individuals, including State officials, may be responsible under international law was established in the aftermath of World War II. It was included in the London Charter of 1945 which established the Nürnberg Tribunal[880] and was subsequently endorsed by the General Assembly.[881] It underpins more recent developments in the field of international criminal law, including the two ad hoc tribunals and the Rome Statute of the

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[879] See the work of the Institut de Droit International under Prof. R. Higgins *Annuaire de l'Institut de Droit International*, vol. 66-I (1995), p. 251; vol. 66-II (1996), p. 444; P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Bruylant Editions de l'Université de Bruxelles, Brussels, 1998). See also WTO, *Turkey - Restrictions on Imports of Textile and Clothing Products*, Panel Report, 31 May 1999, WT/DS34/R, paras. 9.33-9.44.

[880] Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, London, United Nations, *Treaty Series*, vol. 82, p. 279.

[881] G.A. Res. 95 (I), 11 December 1946. See also the International Law Commission's Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, *Yearbook... 1950*, vol. II, p. 374.

International Criminal Court.[882] So far this principle has operated in the field of criminal responsibility, but it is not excluded that developments may occur in the field of individual civil responsibility.[883] As a saving clause article 58 is not intended to exclude that possibility; hence the use of the general term "individual responsibility".

(3) Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility.[884] The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.[885] Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them. The former principle is reflected, for example, in article 25 (4) of the Rome Statute, which provides that "[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law." The latter is reflected, for example, in the well-established principle that official position does not excuse a person from individual criminal responsibility under international law.[886]

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[882] See commentary to Part Two, chapter III, para. (6).

[883] See e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, *Treaty Series,* vol. 1465 p. 112, art. 14, dealing with compensation for victims of torture.

[884] See e.g., *Streletz, Kessler & Krenz v. Germany,* (Applications Nos. 34044/96, 35532/97 and 44801/98), European Court of Human Rights, judgement of 22 March 2001, at para. 104; ("If the GDR still existed, it would be responsible from the viewpoint of international law for the acts concerned. It remains to be established that alongside that State responsibility the applicants individually bore criminal responsibility at the material time").

[885] Prosecution and punishment of responsible State officials may be relevant to reparation, especially satisfaction: see commentary to article 36, para. (5).

[886] See e.g., the International Law Commission's Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle III (*Yearbook... 1950*, vol. II, p. 374, at p. 375); Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9, art. 27.

(4) Article 58 reflects this situation, making it clear that the Articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term "individual responsibility" has acquired an accepted meaning in light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.

Article 59

Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

Commentary

(1) In accordance with article 103 of the Charter, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." The focus of article 103 is on treaty obligations inconsistent with obligations arising under the Charter. But such conflicts can have an incidence on issues dealt with in the Articles, as for example in the *Lockerbie* cases.[887] More generally, the competent organs of the United Nations have often recommended or required that compensation be paid following conduct by a State characterized as a breach of its international obligations, and article 103 may have a role to play in such cases.

(2) Article 59 accordingly provides that the Articles cannot affect and are without prejudice to the Charter of the United Nations. The Articles are in all respects to be interpreted in conformity with the Charter of the United Nations.

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[887] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, I.C.J. Reports 1992*, p. 3; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, I.C.J. Reports 1992*, p. 114.

CHAPTER V

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (PREVENTION OF TRANSBOUNDARY HARM FROM HAZARDOUS ACTIVITIES)

A. Introduction

78. The Commission, at its thirtieth session (1978), included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur.[888]

79. The Commission, from its thirty-second (1980) to its thirty-sixth sessions (1984), received and considered five reports from the Special Rapporteur.[889] The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

80. The Commission, at its thirty-sixth session (1984), also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the

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[888] At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic. For the report of the Working Group, see *Yearbook ... 1978*, vol. II (Part Two), pp. 150-152.

[889] For the five reports of the Special Rapport, see *Yearbook ... 1980*, vol. II (Part One) p. 247, document A/CN.4/334 and Add.1 and 2; *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2; *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360; *Yearbook ... 1983*, vol. II (Part One), p. 201, document A/CN.4/373; *Yearbook ... 1984*, vol. II (Part One) p. 155, document A/CN.4/383 and Add.1.

schematic outline[890] and a study prepared by the secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law".[891]

81. The Commission, at its thirty-seventh session (1985), appointed Mr. Julio Barboza, Special Rapporteur for the topic. The Commission received 12 reports from the Special Rapporteur from its thirty-seventh (1985) to its forty-eighth session (1996).[892]

82. At its forty-fourth session (1992), the Commission established a Working Group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic.[893] On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting on 8 July 1992 decided to continue the work on this topic in stages. First to complete work on prevention of transboundary harm and to proceed with remedial measures.[894] The Commission decided that, in view of the ambiguity in the title of the topic, to continue with the working hypothesis that the topic deal with "activities" and to defer any formal change of the title.

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[890] *Yearbook ... 1984*, vol. II (Part One), p. 129, document A/CN.4/378.

[891] *Yearbook ... 1985*, vol. II (Part One) Addendum, document A/CN.4/384. See also "Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law", *Yearbook ...1995*, vol. II (Part One), document A/CN.4/471.

[892] For the 12 reports of the Special Rapporteur, see:

Yearbook ... 1985, vol. II (Part One), p. 97, document A/CN.4/394;
Yearbook ... 1986, vol. II (Part One), p. 145, document A/CN.4/402;
Yearbook ... 1987, vol. II (Part One) p. 47, document A/CN.4/405;
Yearbook ... 1988, vol. II (Part One), p. 251, document A/CN.4/413;
Yearbook ... 1989, vol. II (Part One), p. 131, document A/CN.4/423;
Yearbook ... 1990, vol. II (Part One), p. 83, document A/CN.4/428;
Yearbook ... 1991, vol. II (Part One), p. 71, document A/CN.4/437;
Yearbook ... 1992, vol. II (Part One), p. 75, document A/CN.4/443;
Yearbook ... 1993, vol. II (Part One), document A/CN.4/450;
document A/CN.4/459; document A/CN.4/468; and document A/CN.4/475 and Add.1.

[893] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10* (A/47/10) pp. 127-129.

[894] For a detailed recommendation of the Commission see ibid., *Fiftieth Session, Supplement No. 10* (A/50/10) pp. 196-198.

83. At its forty-eighth session (1996), the Commission re-established the Working Group in order to review the topic in all its aspects in the light of the reports of the Special Rapporteur and the discussions held, over the years, in the Commission and make recommendations to the Commission.

84. The Working Group submitted a report[895] which provided a complete picture of the topic relating to the principle of prevention and that of liability for compensation or other relief, presenting articles and commentaries thereto.

85. At its forty-ninth session (1997), the Commission established again a Working Group to consider the question of how the Commission should proceed with its work on this topic. The Working Group reviewed the work of the Commission on the topic since 1978. It noted that the scope and the content of the topic remained unclear due to such factors as conceptual and theoretical difficulties, appropriateness of the title and the relation of the subject to "State responsibility". The Working Group further noted that the Commission had dealt with two issues under the topic: "prevention" and "international liability". In the view of the Working Group, these two issues were distinct from one another, though related. The Working Group therefore agreed that henceforth the issues of prevention and of liability should be dealt with separately.

86. Accordingly the Commission decided to proceed with its work on the topic "International liability for injurious consequences arising out of acts not prohibited by international law", dealing first with the issue of prevention under the subtitle "Prevention of transboundary damage from hazardous activities".[896] The General Assembly took note of this decision in paragraph 7 of its resolution 52/156.

87. At the same session, the Commission appointed Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for this part of the topic.[897]

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[895] *Official Records of the General Assembly, Forty-eighth session, Supplement No. 10* (A/51/10), Annex I.

[896] Ibid., *Fifty-second Session, Supplement No.10* (A/52/10), para. 168.

[897] Ibid.

88. At its fiftieth session (1998), the Commission received and considered the first report of the Special Rapporteur,[898] and adopted on first reading a set of 17 draft articles on prevention of transboundary damage from hazardous activities.

89. In accordance with articles 16 and 21 of its Statute, the Commission transmitted the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2000.

90. At its fifty-first (1999) and fifty-second (2000) sessions, the Commission received and considered the second[899] and third[900] reports of the Special Rapporteur. The Commission also had before it comments and observations received from Governments.[901] At its 2643rd meeting, on 20 July 2000, the Commission referred the draft preamble and revised draft articles to the Drafting Committee.

B. Consideration of the topic at the present session

91. At the present session, the Drafting Committee considered the draft articles which the Commission had referred to it last year. The Chairman of the Drafting Committee presented his report (A/CN.4/L.601, Corrs.1 (English only) and 2) at the 2675th meeting of the Commission held on 11 May 2001. At the same meeting, the Commission considered the report of the Drafting Committee and adopted the final text of a draft preamble and a set of 19 draft articles on Prevention of Transboundary Harm from Hazardous Activities.

92. At its 2697th, 2698th, 2699th and 2700th meetings, from 27 July to 2 August 2001, the Commission adopted the commentaries to the aforementioned draft articles.

93. In accordance with its Statute, the Commission submits the draft preamble and the draft articles to the General Assembly, together with a recommendation set out below.

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[898] A/CN.4/487 and Add.1.

[899] A/CN.4/501.

[900] A/CN.4/510.

[901] A/CN.4/509 and A/CN.4/516, the latter being received in 2001.

C. Recommendation of the Commission

94. At its 2701st meeting, on 3 August 2001, the Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly the elaboration of a convention by the Assembly on the basis of the draft articles on prevention of transboundary harm from hazardous activities.

D. Tribute to the Special Rapporteur, Mr. Pemmaraju Sreenivasa Rao

95. At its 2701st meeting, on 3 August 2001, the Commission, after adopting the text of the draft preamble and draft articles on prevention of transboundary harm from hazardous activities, adopted the following resolution by acclamation:

> "*The International Law Commission,*
>
> *Having adopted* the draft preamble and draft articles on prevention of transboundary harm from hazardous activities,
>
> *Expresses* to the Special Rapporteur, Mr. Pemmaraju Sreenivasa Rao, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the draft preamble and draft articles through his tireless efforts and devoted work, and for the results achieved in the elaboration of the draft preamble and draft articles on prevention of transboundary harm from hazardous activities."

96. The Commission also expressed its deep appreciation to the previous Special Rapporteurs, Mr. Robert Q. Quentin-Baxter and Mr. Julio Barboza, for their outstanding contribution to the work on the topic.

E. Text of the draft articles on Prevention of Transboundary Harm from Hazardous Activities

1. Text of the draft articles

97. The text of the draft preamble and draft articles adopted by the Commission at its fifty-third session are reproduced below.

PREVENTION OF TRANSBOUNDARY HARM FROM HAZARDOUS ACTIVITIES

The States Parties,

Having in mind Article 13, paragraph 1 (a) of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification, *Bearing in mind* the principle of permanent sovereignty of States over the natural resources within their territory or otherwise under their jurisdiction or control,

Bearing also in mind that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited,

Recalling the Rio Declaration on Environment and Development of 13 June 1992,

Recognizing the importance of promoting international cooperation,

Have agreed as follows:

Article 1

Scope

The present articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

Article 2

Use of terms

For the purposes of the present articles:

(*a*) "Risk of causing significant transboundary harm" includes risks taking the form of a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm;

(*b*) "Harm" means harm caused to persons, property or the environment;

(*c*) "Transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(*d*) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are planned or are carried out;

(*e*) "State likely to be affected" means the State or States in the territory of which there is the risk of significant transboundary harm or which have jurisdiction or control over any other place where there is such a risk;

(*f*) "States concerned" means the State of origin and the State likely to be affected.

Article 3

Prevention

The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.

Article 4

Cooperation

States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof.

Article 5

Implementation

States concerned shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present articles.

Article 6

Authorization

1. The State of origin shall require its prior authorization for:

(*a*) Any activity within the scope of the present articles carried out in its territory or otherwise under its jurisdiction or control;

(*b*) Any major change in an activity referred to in subparagraph (*a*);

(*c*) Any plan to change an activity which may transform it into one falling within the scope of the present articles.

2. The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present articles. Authorizations already issued by the State for pre-existing activities shall be reviewed in order to comply with the present articles.

3. In case of a failure to conform to the terms of the authorization, the State of origin shall take such actions as appropriate, including where necessary terminating the authorization.

Article 7

Assessment of risk

Any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.

Article 8

Notification and information

1. If the assessment referred to in article 7 indicates a risk of causing significant transboundary harm, the State of origin shall provide the State likely to be affected with timely notification of the risk and the assessment and shall transmit to it the available technical and all other relevant information on which the assessment is based.

2. The State of origin shall not take any decision on authorization of the activity pending the receipt, within a period not exceeding six months, of the response from the State likely to be affected.

Article 9

Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof. The States concerned shall agree, at the commencement of such consultations, on a reasonable time-frame for the consultations.

2. The States concerned shall seek solutions based on an equitable balance of interests in the light of article 10.

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued, without prejudice to the rights of any State likely to be affected

Article 10

Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 9, the States concerned shall take into account all relevant factors and circumstances, including:

(*a*) The degree of risk of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm;

(*b*) The importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the State likely to be affected;

(*c*) The risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment;

(*d*) The degree to which the State of origin and, as appropriate, the State likely to be affected are prepared to contribute to the costs of prevention;

(*e*) The economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(*f*) The standards of prevention which the State likely to be affected applies to the same or comparable activities and the standards applied in comparable regional or international practice.

Article 11

Procedures in the absence of notification

1. If a State has reasonable grounds to believe that an activity planned or carried out in the State of origin may involve a risk of causing significant transboundary harm to it, it may request the State of origin to apply the provision of article 8. The request shall be accompanied by a documented explanation setting forth its grounds.

2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article 8, it shall so inform the requesting State within a reasonable time, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy that State, at its request, the two States shall promptly enter into consultations in the manner indicated in article 9.

3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a reasonable period.

Article 12

Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all available information concerning that activity relevant to preventing significant transboundary harm or at any event minimizing the risk thereof. Such an exchange of information shall continue until such time as the States concerned consider it appropriate even after the activity is terminated.

Article 13

Information to the public

States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Article 14

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets or concerning intellectual property may be withheld, but the State of origin shall cooperate in good faith with the State likely to be affected in providing as much information as possible under the circumstances.

Article 15

Non-discrimination

Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of an activity within the scope of the present articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.

Article 16

Emergency preparedness

The State of origin shall develop contingency plans for responding to emergencies, in cooperation, where appropriate, with the State likely to be affected and competent international organizations.

Article 17

Notification of an emergency

The State of origin shall, without delay and by the most expeditious means, at its disposal, notify the State likely to be affected of an emergency concerning an activity within the scope of the present articles and provide it with all relevant and available information.

Article 18

Relationship to other rules of international law

The present articles are without prejudice to any obligation incurred by States under relevant treaties or rules of customary international law.

Article 19

Settlement of disputes

1. Any dispute concerning the interpretation or application of the present articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties to the dispute, including negotiations, mediation, conciliation, arbitration or judicial settlement.

2. Failing an agreement on the means for the peaceful settlement of the dispute within a period of six months, the parties to the dispute shall, at the request of any of them, have recourse to the establishment of an impartial fact-finding commission.

3. The Fact-finding Commission shall be composed of one member nominated by each party to the dispute and in addition a member not having the nationality of any of the parties to the dispute chosen by the nominated members who shall serve as Chairperson.

4. If more than one State is involved on one side of the dispute and those States do not agree on a common member of the Commission and each of them nominates a member, the other party to the dispute has the right to nominate an equal number of members of the Commission.

5. If the members nominated by the parties to the dispute are unable to agree on a Chairperson within three months of the request for the establishment of the Commission, any party to the dispute may request the Secretary-General of the United Nations to appoint the Chairperson who shall not have the nationality of any of the parties to the dispute. If one of the parties to the dispute fails to nominate a member within three months of the initial request pursuant to paragraph 2, any other party to the dispute may request the Secretary-General of the United Nations to appoint a person who shall not have the nationality of any of the parties to the dispute. The person so appointed shall constitute a single-member Commission.

6. The Commission shall adopt its report by a majority vote, unless it is a single-member Commission, and shall submit that report to the parties to the dispute setting forth its findings and recommendations, which the parties to the dispute shall consider in good faith.

2. Text of the draft articles with commentaries thereto

98. The text of the articles, adopted by the Commission at its fifty-third session, with commentaries thereto are reproduced below.

PREVENTION OF TRANSBOUNDARY HARM FROM HAZARDOUS ACTIVITIES

General commentary

(1) The articles deal with the concept of prevention in the context of authorization and regulation of hazardous activities which pose a significant risk of transboundary harm. Prevention in this sense, as a procedure or as a duty, deals with the phase prior to the situation where significant harm or damage might actually occur, requiring States concerned to invoke remedial or compensatory measures, which often involve issues concerning liability.

(2) The concept of prevention has assumed great significance and topicality. The emphasis upon the duty to prevent as opposed to the obligation to repair, remedy or compensate has several important aspects. Prevention should be a preferred policy because compensation in case of harm often cannot restore the situation prevailing prior to the event or accident. Discharge of the duty of prevention or due diligence is all the more required as knowledge regarding the operation of hazardous activities, materials used and the process of managing them and the risks involved is steadily growing. From a legal point of view, the enhanced ability to trace the chain of causation, i.e. the physical link between the cause (activity) and the effect (harm), and even the several intermediate links in such a chain of causation, makes it also imperative for operators of hazardous activities to take all steps necessary to prevent harm. In any event, prevention as a policy is better than cure.

(3) Prevention of transboundary harm arising from hazardous activities is an objective well emphasized by principle 2 of the Rio Declaration[902] and confirmed by the International Court of Justice in its advisory opinion of 8 July 1996 on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*[903] as now forming part of the corpus of international law.

(4) The issue of prevention, therefore, has rightly been stressed by the Experts Group on Environmental Law of the World Commission on Environment and Development. Article 10 recommended by the Group in respect of transboundary natural resources and environmental interferences thus reads: "States shall, without prejudice to the principles laid down in articles 11 and 12, prevent or abate any transboundary environmental interference or a significant risk thereof which causes substantial harm - i.e. harm which is not minor or insignificant."[904] It must be further noted that the well-established principle of prevention was highlighted in the arbitral award in the *Trail Smelter* case and was reiterated not only in principle 21 of the Stockholm Declaration[905] and principle 2 of the Rio Declaration but also in General Assembly resolution 2995 (XXVII) of 15 December 1972 on cooperation between States in the field of the environment. This principle is also reflected in principle 3 of the 1978 draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, which provided that States must "avoid to the maximum extent possible and ... reduce to the minimum extent possible the adverse environmental effects beyond its jurisdiction of the

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[902] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

[903] Advisory opinion of 8 July 1996, *I.C.J. Reports 1996*, p. 15, para. 29; see also A/51/218, annex.

[904] *Environmental Protection and Sustainable Development - Legal Principles and Recommendations*, adopted by the Experts Group on Environmental Law of the World Commission on Environment and Development (Graham and Trotman/Martinus Nijhoff, 1986), p. 75. It was also noted that the duty not to cause substantial harm could be deduced from the non-treaty-based practice of States, and from the statements made by States individually and/or collectively. See J.G. Lammers, *Pollution of International Watercourses* (The Hague, Martinus Nijhoff, 1984), pp. 346-347, 374-376.

[905] *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14).

utilization of a shared natural resource so as to protect the environment, in particular when such utilization might: (a) cause damage to the environment which could have repercussions on the utilization of the resource by another sharing State; (b) threaten the conservation of a shared renewable resource; (c) endanger the health of the population of another State."[906]

(5) Prevention of transboundary harm to the environment, persons and property has been accepted as an important principle in many multilateral treaties concerning protection of the environment, nuclear accidents, space objects, international watercourses, management of hazardous wastes and prevention of marine pollution.[907]

PREVENTION OF TRANSBOUNDARY HARM FROM HAZARDOUS ACTIVITIES

Preamble

The States Parties,

Having in mind Article 13, paragraph 1 (a) of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

Bearing in mind the principle of permanent sovereignty of States over the natural resources within their territory or otherwise under their jurisdiction or control,

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[906] Decision 6/14 of the Governing Council of the United Nations Environment Programme (UNEP) of 19 May 1978, *Official Records of the General Assembly, Thirty-Third Session, Supplement No. 25* (A/33/25), annex I, reprinted in ILM, vol. 17 (1978), p. 1098. For a mention of other sources where the principle of prevention is reflected, see *Environmental Protection and Sustainable Development - Legal Principles and Recommendations* (footnote 904 above), pp. 75-80.

[907] For a collection of treaties arranged according to the area or sector of the environment covered and protection offered against particular threats, see E. Brown Weiss, D.B. Magraw and P.C. Szasz, *International Environmental Law: Basic Instruments and References* (Transnational Pubs. Inc. 1992); P. Sands, *Principles of International Environmental Law*, vol. 1 (Frameworks, Standards and Implementation), (Manchester Press 1995); L. Boisson de Chazournes, R. Desgagné, C. Romano (eds.) Protection internationale de l'environnement, *Recueil d'instruments juridiques*, (Paris, Pedone, 1998); C. Dommen, Ph. Cullet, *Droit international de l'environnement*, Textes de base et références, (Kluwer, 1998); M. Prieur, St. Doumbe-Bille (eds.), *Recueil francophone des instruments internationaux de protection de l'environnement*, AUPELF/EDICEF, 1998; A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development*; Past Achievements and Future Challenges (Oxford University Press, 1999); F.L. Morrison and R. Wolfrum (eds.), *International, Regional and National Environmental Law* (Kluwer Law International, 2000); P.W. Birnie and A. Boyle, *International Law and the Environment* (Oxford University Press, 2002) (forthcoming), 2nd ed.

Bearing also in mind that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited,

Recalling the Rio Declaration on Environment and Development of 13 June 1992,

Recognizing the importance of promoting international cooperation,

Have agreed as follows:

Commentary

(1) The preamble sets out the general context in which the topic of prevention is elaborated, keeping in view the mandate given to the Commission to codify and develop international law. Activities covered under the present topic of prevention require States to engage in cooperation and accommodation in their mutual interest. States are free to formulate necessary policies to develop their natural resources and to carry out or authorize activities in response to the needs of their populations. In so doing, however, States have to ensure that such activities are carried out taking into account the interests of other States and therefore the freedom they have within their own jurisdiction is not unlimited.

(2) The prevention of transboundary harm from hazardous activities should also be seen in the context of the general principles incorporated in the Rio Declaration and other considerations that emphasize the close inter-relationship between issues of environment and development. A general reference in preambular paragraph 3 to the Rio Declaration indicates the importance of the interactive nature of all the principles contained therein. This is without prejudice to highlighting specific principles of the Rio Declaration, as appropriate, in the commentaries to follow on particular articles.

Article 1

Scope

> The present articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

Commentary

(1) Article 1 limits the scope of the articles to activities not prohibited by international law and which involve a risk of causing significant transboundary harm through their physical consequences. Subparagraph (*d*) of article 2 further limits the scope of the articles to those activities carried out in the territory or otherwise under the jurisdiction or control of a State.

(2) Any activity which involves the risk of causing significant transboundary harm through the physical consequences is within the scope of the articles. Different types of activities could be envisaged under this category. As the title of the proposed articles indicates any hazardous and by inference any ultra-hazardous activity which involves a risk of significant transboundary harm is covered. An ultra-hazardous activity is perceived to be an activity with a danger that is rarely expected to materialize but might assume, on that rare occasion grave (more than significant, serious or substantial) proportions.

(3) Suggestions have been made at different stages of the evolution of the present articles to specify a list of activities in an annex to the present articles with an option to make additions or deletions to such a list in the future as appropriate. States could also be given the option to add or delete items to the list which they may include in any national legislation aimed at implementing the obligations of prevention.

(4) It is however felt that specification of a list of activities in an annex to the articles is not without problems and functionally not essential. Any such list of activities is likely to be under inclusion and could become quickly dated from time to time in the light of fast evolving technology. Further, except for certain ultra-hazardous activities which are mostly the subject of special regulation, e.g., in the nuclear field or in the context of activities in outer space, the risk that flows from an activity is primarily a function of the particular application, the specific context and the manner of operation. It is felt that a generic list could not capture these elements.

(5) It may be further noted that it is always open to States to specify activities coming within the scope of the articles in any regional or bilateral agreements or to do so in their national legislation regulating such activities and implementing obligations of prevention.[908] In any case, the scope of the articles is clarified by the four different criteria noted in the article.

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[908] For example, various conventions deal with the type of activities which come under their scope: the Convention for the Prevention of Marine Pollution from Land-based Sources, UNEP, *Selected Multilateral Treaties in the Field of the Environment*, Ref. Series 3, 1983, p. 430, reprinted in ILM, vol. 13 (1974), p. 352; the Protocol to the Convention for the Protection of the Mediterranean Sea against Pollution, ibid.; the Convention on the Protection of the Rhine against Chemical Pollution, United Nations, *Treaty Series*, vol. 1124, p. 375; annex I to the Convention on Environmental Impact Assessment in a Transboundary Context, (E/ECE/1250), reprinted in *International Legal Materials*, vol. 30 (1991), p. 800, where a number of activities such as the crude oil refineries, thermal power stations, installations to produce enriched nuclear fuels, etc., are identified as possibly dangerous to the environment and requiring environmental impact

(6) The first criterion to define the scope of the articles refers to "activities not prohibited by international law". This approach has been adopted in order to separate the topic of international liability from the topic of State responsibility.[909] The employment of this criterion is also intended to allow a State likely to be affected by an activity involving the risk of causing significant transboundary harm to demand from the State of origin compliance with obligations of prevention although the activity itself is not prohibited. In addition, an invocation of these articles by a State likely to be affected is not a bar to a later claim by that State that the activity in question is a prohibited activity. Equally, it is to be understood that non-fulfilment of the duty of prevention at any event of the minimization of risk under the articles would not give rise to the implication that the activity itself is prohibited.[910] However, in such a case State responsibility could be engaged to implement the obligations, including any civil responsibility or duty of the operator.[911] The articles are primarily concerned with the management of risk and emphasize the

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assessment under the Convention, the 1992 Convention on the Protection of Marine Environment of the Baltic Sea Area, [IMO 1] LDC.2/Circ.303; the Convention on the Transboundary Effects of Industrial Accidents (doc. ENVWA/R.54 and Add.1), reprinted in ILM, vol. 31 (1992), p. 1333; Annex II to the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (*European Treaty Series*, No. 150), where activities such as the installations or sites for the partial or complete disposal of solid, liquid or gaseous wastes by incineration on land or at sea, installations or sites for thermal degradation of solid, gaseous or liquid wastes under reduced oxygen supply, etc., have been identified as dangerous activities; this Convention also has a list of dangerous substances in annex I.

[909] *Official Records of the General Assembly, Thirty-Second Session, Supplement No. 10* (A/32/10), para. 17.

[910] See M.B. Akehurst "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law", *Netherlands Yearbook of International Law,* vol. 16 (1985), pp. 3-16; Alan E. Boyle, "State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A necessary distinction?" *International and Comparative Law Quarterly*, vol. 39 (1990), pp. 1-25; Karl Zemanek, "State Responsibility and Liability", in W. Lang, H. Neuhold, K. Zemanek (eds.), *Environmental Protection and International Law* (1991), p. 197; P.S. Rao, the Second Report on Prevention of Transboundary Damage from Hazardous Activities, doc. A/CN.4/501, paras. 35-37.

[911] See P.M. Dupuy, *La responsabilité internationale des États pour les dommages d'origine techologique et industrielle* (Paris, Pedone, 1977), p. 319; I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (1983), p. 50; A. Rosas, "State Responsibility and Liability under Civil Liability Regimes", in O. Bring and Said Mahmoudi (eds.), *Current International Law Issues: Nordic Perspectives (Essays in honour of Jerzy Sztucki)*, (M. Nijoff, Boston, 1994);

duty of cooperation and consultation among all States concerned. States likely to be affected are given the right of engagement with the State of origin in designing and, where appropriate, in the implementation of a system of management of risk commonly shared between or among them. The right thus envisaged in favour of the States likely to be affected however does not give them the right to veto the activity or project itself.[912]

(7) The second criterion, found in the definition of the State of origin in article 2, subparagraph (d), is that the activities to which preventive measures are applicable "are planned or are carried out" in the territory or otherwise under the jurisdiction or control of a State. Three concepts are used in this criterion: "territory", "jurisdiction" and "control". Even though the expression "jurisdiction or control of a State" is a more commonly used formula in some instruments[913] the Commission finds it useful to mention also the concept of "territory" in order to emphasize the importance of the territorial link, when such a link exists, between activities under these articles and a State.

(8) For the purposes of these articles, territorial jurisdiction is the dominant criterion. Consequently, when an activity covered by the present articles occurs within the territory of a State, that State must comply with the obligations of prevention. "Territory" is, therefore, taken

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and Fouad Bitar "Les mouvements transfrontaliers de déchets dangereux selon la Convention de Bâle", *Etude des régimes de responsabilité* (Paris, Pedone, 1997), pp. 79-137. However, different standards of liability, burden of proof and remedies apply to State responsibility and liability. See also P.M. Dupuy, "Où en est le droit international de l'environnement à la fin du siècle?" in *Revue générale de droit international public* (1997-4), pp. 873-903; Teresa A. Berwick, "Responsibility and Liability for Environmental Damage: A Roadmap for International Environmental Regimes", *Georgetown International Environmental Review* (1998), pp. 257-267; and "A propos des mésaventures de la responsabilité internationale des États dans ses rapports avec la protection internationale de l'environnement", in *Les Hommes et l'environnement en hommage à Alexandre Kiss* (Paris, Frison-Roche, 1998), (see footnote 948 below).

[912] On the nature of the duty of engagement and the attainment of a balance of interests involved, see P.S. Rao, First Report on prevention of transboundary damage from hazardous activities, doc. A/CN.4/487, paras. 43, 44, 54 and 55 (d).

[913] See, for example, principle 21 of the Stockholm Declaration (see footnote 905 above), United Nations Convention on the Law of the Sea, *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122, art. 194, para. 2; principle 2 of the Rio Declaration (see footnote 902 above), and article 3 of the *Convention on Biological Diversity*, Doc. UNEP/Bio.Div/N7-INC.5/4, reprinted in ILM, vol. 31 (1992), p. 1808.

as conclusive evidence of jurisdiction. Consequently, in cases of competing jurisdictions over an activity covered by these articles, the territorially based jurisdiction prevails. The Commission, however, is mindful of situations where a State, under international law, has to accept limits to its territorial jurisdiction in favour of another State. The prime example of such a situation is innocent passage of a foreign ship through the territorial sea. In such situations, if the activity leading to significant transboundary harm emanates from the foreign ship, the flag State and not the territorial State must comply with the provisions of the present articles.

(9) The concept of "territory" for the purposes of these articles does not cover all cases where a State exercises "jurisdiction" or "control". The expression "jurisdiction" of a State is intended to cover, in addition to the activities being undertaken within the territory of a State, activities over which, under international law, a State is authorized to exercise its competence and authority. The Commission is aware that questions involving the determination of jurisdiction are complex and sometimes constitute the core of a dispute. This article certainly does not presume to resolve all the questions of conflicts of jurisdiction.

(10) Sometimes, because of the location of the activity, there is no territorial link between a State and the activity such as, for example, activities taking place in outer space or on the high seas. The most common example is the jurisdiction of the flag State over a ship. The 1958 Geneva Conventions on the Law of the Sea and the 1982 United Nations Convention on the Law of the Sea have covered many jurisdictional capacities of the flag State.

(11) In cases of concurrent jurisdiction by more than one State over the activities covered by these articles, States shall individually and, when appropriate, jointly comply with the provisions of these articles.

(12) The function of the concept of "control" in international law is to attach certain legal consequences to a State whose jurisdiction over certain activities or events is not recognized by international law; it covers situations in which a State is exercising de facto jurisdiction, even though it lacks jurisdiction *de jure*, such as in cases of unlawful intervention, occupation and unlawful annexation. Reference may be made, in this respect, to the advisory opinion by the International Court of Justice in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.[914] In that opinion, the Court, after holding South Africa responsible for

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[914] *I.C.J. Reports 1971*, p. 16.

having created and maintained a situation which the Court declared illegal and finding South Africa under an obligation to withdraw its administration from Namibia, nevertheless attached certain legal consequences to the de facto control of South Africa over Namibia. The Court held:

> "The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States."[915]

(13) The third criterion is that activities covered in these articles must involve a "risk of causing significant transboundary harm". The term is defined in article 2 (see the commentary to article 2). The words "transboundary harm" are intended to exclude activities which cause harm only in the territory of the State within which the activity is undertaken without the possibility of any harm to any other State. For discussion of the term "significant", see the commentary to article 2.

(14) As to the element of "risk", this is by definition concerned with future possibilities, and thus implies some element of assessment or appreciation of risk. The mere fact that harm eventually results from an activity does not mean that the activity involved a risk, if no properly informed observer was or could have been aware of that risk at the time the activity was carried out. On the other hand, an activity may involve a risk of causing significant transboundary harm even though those responsible for carrying out the activity underestimated the risk or were even unaware of it. The notion of risk is thus to be taken objectively, as denoting an appreciation of possible harm resulting from an activity which a properly informed observer had or ought to have had.

(15) In this context, it should be stressed that these articles as a whole have a continuing operation and effect, i.e., unless otherwise stated, they apply to activities as carried out from time to time. Thus it is possible that an activity which in its inception did not involve any risk (in the sense explained in paragraph (14)), might come to do so as a result of some event or development. For example, a perfectly safe reservoir may become dangerous as a result of an

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[915] Ibid., para. 118.

earthquake, in which case the continued operation of the reservoir would be an activity involving risk. Or developments in scientific knowledge might reveal an inherent weakness in a structure or materials which carry a risk of failure or collapse, in which case again the present articles might come to apply to the activity concerned in accordance with their terms.

(16) The fourth criterion is that the significant transboundary harm must have been caused by the "physical consequences" of such activities. It was agreed by the Commission that in order to bring this topic within a manageable scope, it should exclude transboundary harm which may be caused by State policies in monetary, socio-economic or similar fields. The Commission feels that the most effective way of limiting the scope of these articles, is by requiring that these activities should have transboundary physical consequences which, in turn, result in significant harm.

(17) The physical link must connect the activity with its transboundary effects. This implies a connection of a very specific type - a consequence which does or may arise out of the very nature of the activity or situation in question. That implies that the activities covered in these articles must themselves have a physical quality, and the consequences must flow from that quality. Thus, the stockpiling of weapons does not entail the consequence that the weapons stockpiled will be put to a belligerent use. Yet this stockpiling may be characterized as an activity which, because of the explosive or incendiary properties of the materials stored, entails an inherent risk of disastrous misadventure.

Article 2

Use of terms

For the purposes of the present articles:

(*a*) "Risk of causing significant transboundary harm" includes risks taking the form of a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm;

(*b*) "Harm" means harm caused to persons, property or the environment;

(*c*) "Transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(*d*) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are planned or are carried out;

(*e*) "State likely to be affected" means the State or States in the territory of which there is the risk of significant transboundary harm or which have jurisdiction or control over any other place where there is such a risk;

(*f*) "States concerned" means the State of origin and the State likely to be affected.

Commentary

(1) Subparagraph (a) defines the concept of "risk of causing significant transboundary harm" as encompassing a low probability of causing disastrous transboundary harm or a high probability of causing significant transboundary harm. The Commission feels that instead of defining separately the concept of "risk" and then "harm", it is more appropriate to define the expression of "risk of causing significant transboundary harm" because of the interrelationship between "risk" and "harm" and the relationship between them and the adjective "significant".

(2) For the purposes of these articles, "risk of causing significant transboundary harm" refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact. It is, therefore, the combined effect of "risk" and "harm" which sets the threshold. In this respect inspiration is drawn from the Code of Conduct on Accidental Pollution of Transboundary Inland Waters,[916] adopted by the Economic Commission for Europe in 1990. Under article I, paragraph (f), of the Code of Conduct, "'risk' means the combined effect of the probability of occurrence of an undesirable event and its magnitude". A definition based on the combined effect of "risk" and "harm" is more appropriate for these articles, and *the combined effect should reach a level that is deemed significant*. The obligations of prevention imposed on States are thus not only reasonable but also sufficiently limited so as not to impose such obligations in respect of virtually any activity. The purpose is to strike a balance between the interests of the States concerned.

(3) The definition in the preceding paragraph allows for a spectrum of relationships between "risk" and "harm", all of which would reach the level of "significant". The definition refers to two types of activities under these articles. One is where there is a low probability of causing disastrous harm. This is normally the characteristic of ultra-hazardous activities. The other one is where there is a high probability of causing significant harm. This includes activities which have a high probability of causing harm which, while not disastrous, is still significant. But it

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[916] E/ECE/1225-ECE/ENVWA/16. See also G. Handl, *Grenzüberschreitendes nukleares Risiko und völkerrechtlicher Schutzanspruch* (Berlin, Duncker und Humblot, 1992) pp. 15-20.

would exclude activities where there is a very low probability of causing significant transboundary harm. The word "includes" is intended to highlight the intention that the definition is providing a spectrum within which the activities under these articles will fall.

(4) The term "significant" is not without ambiguity and a determination has to be made in each specific case. It involves more factual considerations than legal determination. It is to be understood that *"significant" is something more than "detectable" but need not be at the level of "serious" or "substantial"*. The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards.

(5) The ecological unity of the planet does not correspond to political boundaries. In carrying out lawful activities within their own territories States have impacts on each other. These mutual impacts, so long as they have not reached the level of "significant", are considered tolerable.

(6) The idea of a threshold is reflected in the *Trail Smelter* award, which used the words "serious consequences",[917] as well as in the *Lake Lanoux* award, which relied on the concept "seriously" (*gravement*).[918] A number of conventions have also used "significant", "serious" or "substantial" as the threshold.[919] "Significant" has also been used in other legal instruments and domestic law.[920]

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[917] *Trail Smelter* case; *UNRIAA*, vol. III, p. 1965.

[918] *Lake Lanoux Arbitration (France v. Spain)*, ibid., vol. XII, p. 281.

[919] See, for example, article 4 (2) of the Convention on the Regulation of Antarctic Mineral Resource Activities, ILM, vol. 27 (1988), p. 868; articles 2 (1) and (2) of the Convention on Environmental Impact Assessment in a Transboundary Context (see footnote 908 above); article I (b) of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters (see footnote 916 above); and article 7 of the Convention on the Non-navigational Uses of International Watercourses (see General Assembly resolution 51/229, annex).

[920] See, for example, article 5 of the draft Convention on industrial and agricultural uses of international rivers and lakes, prepared by the Inter-American Juridical Committee in 1965 (Organization of American States, Rios y Lagos Internacionales, 4th ed. 1971), p. 132; the Helsinki Rules on the Uses of the Waters of International Rivers, article 10, *International Law Association, Report of the Fifty-second Conference* (Helsinki, 1966), p. 496; paragraphs 1 and 2 of General Assembly resolution 2995 (XXVII) of 15 December 1972 concerning cooperation between States in the field of the environment; Recommendation of the Council of the Organization for Economic Cooperation and Development (OECD) on Principles concerning

(7) The term "significant", while determined by factual and objective criteria, also involves a value determination which depends on the circumstances of a particular case and the period in which such determination is made. For instance, a particular deprivation at a particular time might not be considered "significant" because at that specific time scientific knowledge or human appreciation for a particular resource had not reached a point at which much value was ascribed to that particular resource. But some time later that view might change and the same harm might then be considered "significant".

(8) Subparagraph (b) is self-explanatory in that "harm" for the purpose of the present articles would cover harm caused to persons, property or the environment.

(9) Subparagraph (c) defines "transboundary harm" as meaning harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border. This definition includes, in addition to a typical scenario of an activity within a State with injurious effects on another State, activities conducted under the jurisdiction or control of a State, for example, on the high seas, with effects on the territory of another State or in places under its jurisdiction or control. It includes, for example, injurious impacts on ships or platforms of other States on the high seas as well. It will also include activities conducted in the territory of a State with injurious consequences on, for example, the ships or platforms of another State on the high seas. The Commission cannot forecast all the possible future forms of "transboundary harm". However, it makes clear that the intention is to be able to draw a line and clearly distinguish a State under whose jurisdiction and control an activity covered by these articles is conducted from a State which has suffered the injurious impact.

Transfrontier Pollution, 1974, para. 6, OECD, Non-Discrimination in Relation to Transfrontier Pollution: Leading OECD Documents, p. 35, reprinted in ILM, vol. 14 (1975), p. 246; the 1980 Memorandum of Intent Concerning Transboundary Air Pollution between the United States and Canada, 32 U.S.T., p. 2541, T.I.A.S. No. 9856; and article 7 of the 1983 Mexico-United States Agreement to Cooperate in the Solution of Environmental Problems in the Border Area, in ILM, vol. 22 (1983), p. 1025. The United States has also used the word "significant" in its domestic law dealing with environmental issues. See the *American Law Institute, Restatement of the Law*, Section 601, Reporter's Note 3, pp. 111-112.

(10) In subparagraph (d), the term "State of origin" is introduced to refer to the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out.[921]

(11) In subparagraph (e), the term "State likely to be affected" is defined to mean the State on whose territory or in other places under whose jurisdiction or control there is the risk of significant transboundary harm. There may be more than one such State likely to be affected in relation to any given activity.

(12) In subparagraph (f), the term "States concerned" refers to both the State of origin and the State likely to be affected to which some of the articles refer together.

Article 3

Prevention

> The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.

Commentary

(1) Article 3 is based on the fundamental principle *sic utere tuo ut alienum non laedas*, which is reflected in principle 21 of the Stockholm Declaration,[922] reading:

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own natural resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

(2) However, the limitations on the freedom of States reflected in principle 21 are made more specific in article 3 and subsequent articles.

(3) This article, together with article 4, provides the basic foundation for the articles on prevention. The articles set out the more specific obligations of States to prevent significant transboundary harm or at any event to minimize the risk thereof. The article thus emphasizes the primary duty of the State of origin to prevent significant transboundary harm; and only in case

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[921] See commentary to article 1, paragraphs (7)-(12).

[922] See footnote 913 above. See also the Rio Declaration, footnote 902 above.

this is not fully possible it should exert its best efforts to minimize the risk thereof. The phrase "at any event" is intended to express priority in favour of the duty of prevention. The word "minimize" should be understood in this context as meaning to pursue the aim of reducing to the lowest point the possibility of harm.

(4) The present article is in the nature of a statement of principle. It provides that States shall take all appropriate measures to prevent significant transboundary harm or at any event minimize the risk thereof. The phrase "all appropriate measures" refers to all those specific actions and steps that are specified in the articles on prevention and minimization of transboundary harm. Article 3 is complementary to articles 9 and 10 and together they constitute a harmonious ensemble. In addition, it imposes an obligation on the State of origin to adopt and implement national legislation incorporating accepted international standards. These standards would constitute a necessary reference point to determine whether measures adopted are suitable.

(5) As a general principle, the obligation in article 3 to prevent significant transboundary harm or minimize the risk thereof applies only to activities which involve a risk of causing significant transboundary harm, as those terms are defined in article 2. In general, in the context of prevention, a State of origin does not bear the risk of unforeseeable consequences to States likely to be affected by activities within the scope of these articles. On the other hand the obligation to "take all appropriate measures" to prevent harm, or to minimize the risk thereof, cannot be confined to activities which are already properly appreciated as involving such a risk. The obligation extends to taking appropriate measures to identify activities which involve such a risk, and this obligation is of a continuing character.

(6) This article, then, sets up the principle of prevention that concerns every State in relation to activities covered by article 1. The modalities whereby the State of origin may discharge the obligations of prevention which have been established include, for example, legislative, administrative or other action necessary for enforcing the laws, administrative decisions and policies which the State of origin has adopted.[923]

(7) The obligation of the State of origin to take preventive or minimization measures is one of due diligence. It is the conduct of the State of origin that will determine whether the State has complied with its obligation under the present articles. The duty of due diligence involved

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[923] See article 5 and the commentary thereto.

however is not intended to guarantee that significant harm be totally prevented, if it is not possible to do so. In that eventuality, the State of origin is required, as noted above, to exert its best possible efforts to minimize the risk. In this sense it does not guarantee that the harm would not occur.[924]

(8) An obligation of due diligence as the standard basis for the protection of the environment from harm can be deduced from a number of international conventions[925] as well as from the resolutions and reports of international conferences and organizations.[926] The obligation of due diligence was discussed in a dispute which arose in 1986 between Germany and Switzerland relating to the pollution of the Rhine by Sandoz. The Swiss Government acknowledged responsibility for lack of due diligence in preventing the accident through adequate regulation of its pharmaceutical industries.[927]

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[924] For a similar observation see paragraph (4) of the commentary to article 7 on the law of the non-navigational uses of international watercourses adopted by the International Law Commission on second reading, see *Yearbook ... 1994*, vol. II (Part Two), p. 103. As to the lack of scientific information, see Epiney and M. Scheyli, *Strukturprinzipien des Umweltvölkerrechts* (Baden-Baden, Nomos-Verl.-Ges., 1998) pp. 126-140.

[925] See, for example, article 194, paragraph 1, of the United Nations Convention on the Law of the Sea (see footnote 913 above); articles I, II and VII (2) of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, ILM, vol. 11 (1972), p. 1294; article 2 of the Vienna Convention for the Protection of the Ozone Layer, United Nations, *Treaty Series*, vol. 1513, p. 293, reprinted in ILM, vol. 26 (1987), p. 1529; article 7, paragraph 5, of the Convention on the Regulation of Antarctic Mineral Resources Activities (see footnote 919 above); article 2, paragraph 1, of the Convention on Environmental Impact Assessment in a Transboundary Context (see footnote 908 above); and article 2, paragraph 1, of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, document ENVWA/R.53 and Add.1, reprinted in ILM, vol. 31 (1992), p. 1312.

[926] See principle 21 of the World Charter for Nature, General Assembly resolution 37/7 of 28 October 1982; principle VI of the Draft Principles relating to weather modification prepared by the World Health Organization (WHO) and the United Nations Environment Programme (UNEP), in *Digest of United States Practice in International Law*, 1978, p. 1205.

[927] See *The New York Times*, 11 November 1986, p. A 1; 12 November 1986, p. A 8; 13 November 1986, p. A 3. See also Alexandre Kiss, "'Tchernobâle' ou la pollution accidentelle du Rhin par les produits chimiques", in *Annuaire français de droit international*, vol. 33, (1987), pp. 719-727.

(9) In the *Alabama* case, the Tribunal examined two different definitions of due diligence submitted by the parties. The United States defined due diligence as:

> "[A] diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it; a diligence which shall, by the use of active vigilance, and of all the other means in the power of the neutral, through all stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will."[928]

The United Kingdom defined due diligence as "such care as Governments ordinarily employ in their domestic concerns".[929] The tribunal seemed to have been persuaded by the broader definition of the standard of due diligence presented by the United States and expressed concern about the "national standard" of due diligence presented by the United Kingdom. The tribunal stated that "[the] British case seemed also to narrow the international duties of a Government to the exercise of the restraining powers conferred upon it by municipal law, and to overlook the obligation of the neutral to amend its laws when they were insufficient".[930]

(10) In the context of the present articles, due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them. Thus States are under an obligation to take unilateral measures to prevent significant transboundary harm or at any event to minimize the risk thereof arising out of activities within the scope of article 1. Such measures include, first, formulating policies designed to prevent significant transboundary harm or to minimize the risk thereof and, second, implementing those policies. Such policies are expressed in legislation and administrative regulations and implemented through various enforcement mechanisms.

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[928] *The Geneva Arbitration (The Alabama case)* in J.B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. I, 1898, pp. 572-573.

[929] Ibid., p. 612.

[930] Ibid., p. 613.

(11) The standard of due diligence against which the conduct of State of origin should be examined is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance. For example, activities which may be considered ultra-hazardous require a much higher standard of care in designing policies and a much higher degree of vigour on the part of the State to enforce them. Issues such as the size of the operation; its location, special climate conditions, materials used in the activity, and whether the conclusions drawn from the application of these factors in a specific case are reasonable, are among the factors to be considered in determining the due diligence requirement in each instance. What would be considered a reasonable standard of care or due diligence may change with time; what might be considered an appropriate and reasonable procedure, standard or rule at one point in time may not be considered as such at some point in the future. Hence, due diligence in ensuring safety requires a State to keep abreast of technological changes and scientific developments.

(12) It is also necessary in this connection to note principle 11 of the Rio Declaration on Environment and Development which states:

> "States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries."[931]

(13) Similar language is found in principle 23 of the Stockholm Declaration. That principle, however, specifies that such domestic standards are "[w]ithout prejudice to such criteria as may be agreed upon by the international community".[932] The economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence. But a State's economic level cannot be used to dispense the State from its obligation under the present articles.

(14) Article 3 imposes on the State a duty to take all necessary measures to prevent significant transboundary harm or at any event to minimize the risk thereof. This could involve, *inter alia*,

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[931] See footnote 902 above.

[932] See footnote 905 above.

taking such measures as are appropriate by way of abundant caution, even if full scientific certainty does not exist, to avoid or prevent serious or irreversible damage. This is well articulated in principle 15 of the Rio Declaration and is subject to the capacity of States concerned (see commentary to article 10 (c)). An efficient implementation of the duty of prevention may well require upgrading the input of technology in the activity as well as the allocation of adequate financial and manpower resources with necessary training for the management and monitoring of the activity.

(15) The operator of the activity is expected to bear the costs of prevention to the extent that he is responsible for the operation. The State of origin is also expected to undertake the necessary expenditure to put in place the administrative, financial and monitoring mechanisms referred to in article 5.

(16) States are engaged in continuously evolving mutually beneficial schemes in the areas of capacity-building, transfer of technology and financial resources. Such efforts are recognized to be in the common interest of all States in developing uniform international standards regulating and implementing the duty of prevention.

(17) The main elements of the obligation of due diligence involved in the duty of prevention could be thus stated: the degree of care in question is that expected of a good Government. It should possess a legal system and sufficient resources to maintain an adequate administrative apparatus to control and monitor the activities. It is however understood that the degree of care expected of a State with a well-developed economy and human and material resources and with highly evolved systems and structures of governance is different from States which are not so well placed.[933] Even in the latter case, vigilance, employment of infrastructure and monitoring of hazardous activities in the territory of the State, which is a natural attribute of any Government, are expected.[934]

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[933] See A.C. Kiss and St. Dooumbe-Bille. "La Conférence des Nations Unies sur l'environnement et le développement" (Rio de Janeiro, 3-14 June 1992), in *Annuaire français de droit international,* vol. 38 (1992), pp. 823-843; M. Kamto, "Les nouveaux principes du droit international de l'environnement", in *Revue Juridique de l'Environnement* (France) 1/1993, pp. 11-21. R. Lefeber, *Transboundary Environmental Interference and the Origin of State Liability* (The Hague, Kluwer, 1996), p. 65.

[934] See the observation of Max Huber in *The Spanish Zone of Morocco Claims (Great Britain/Spain)*, case, *UNRIAA,* vol. II, p. 644.

(18) The required degree of care is proportional to the degree of hazard involved. The degree of harm itself should be foreseeable and the State must know or should have known that the given activity has the risk of significant harm. The higher the degree of inadmissible harm, the greater would be the duty of care required to prevent it.

Article 4

Cooperation

> States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof.

Commentary

(1) The principle of cooperation between States is essential in designing and implementing effective policies to prevent significant transboundary harm or at any event to minimize the risk thereof. The requirement of cooperation of States extends to all phases of planning and of implementation. Principle 24 of the Stockholm Declaration and principle 7 of the Rio Declaration recognize cooperation as an essential element in any effective planning for the protection of the environment. More specific forms of cooperation are stipulated in subsequent articles. They envisage the participation of the State likely to be affected in any preventive action, which is indispensable to enhance the effectiveness of any such action. The latter State may know better than anybody else, for instance, which features of the activity in question may be more damaging to it, or which zones of its territory close to the border may be more affected by the transboundary effects of the activity, such as a specially vulnerable ecosystem.

(2) The article requires States concerned to cooperate in *good faith*. Paragraph 2 of Article 2 of the Charter of the United Nations provides that all Members "shall fulfil in good faith the obligations assumed by them in accordance with the present Charter". The 1969 Vienna Convention on the Law of Treaties and the 1978 Vienna Convention on Succession of States in Respect of Treaties declare in their preambles that the principle of good faith is universally recognized. In addition, article 26 and article 31, paragraph 1, of the Vienna Convention on the Law of Treaties acknowledge the essential place of this principle in the law of treaties. The decision of the International Court of Justice in the *Nuclear Tests* case touches upon the scope of the application of good faith. In that case, the Court proclaimed that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is

the principle of good faith".[935] This dictum of the Court implies that good faith applies also to unilateral acts.[936] Indeed the principle of good faith covers "the entire structure of international relations".[937]

(3) The arbitration tribunal established in 1985 between Canada and France in the case *La Bretagne*, held that the principle of good faith was among the elements that afforded a sufficient guarantee against any risk of a party exercising its rights abusively.[938]

(4) The words "States concerned" refer to the State of origin and the State or States likely to be affected. While other States in a position to contribute to the goals of these articles are encouraged to cooperate, no legal obligations are imposed upon them to do so.

(5) The article provides that States shall "as necessary" seek the assistance of one or more international organizations in performing their preventive obligations as set out in these articles. States shall do so only when it is deemed necessary. The words "as necessary" are intended to take account of a number of possibilities: First, assistance from international organizations may not be necessary in every case. For example, the State of origin or the States likely to be affected may, themselves, be technologically advanced and have the necessary technical capability. Second, the term "international organization" is intended to refer to organizations that are competent and in a position to assist in such matters. Third, even if there are competent international organizations, they could extend necessary assistance only in accordance with their constitutions. In any case, the article does not purport to create any obligation for international organizations to respond to requests for assistance independent of its own constitutional requirements.

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[935] *Nuclear Tests* case (*Australia v. France*), *Judgment of 20 December 1974, I.C.J. Reports 1974*, p. 268.

[936] See M. Virally, "Review Essay: Good Faith in Public International Law" *American Journal of International Law*, vol. 77 (1983), p. 130.

[937] See R. Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations: A Survey", *American Journal of International Law*, vol. 65 (1971), p. 734; see more generally, Robert Kolb, "La bonne foi en droit international public", *Contribution à l'étude des principes généraux de droit* (Paris, PUF, 2000) p. 756.

[938] *International Law Reports*, vol. 82, p. 614.

(6) Requests for assistance from international organizations may be made by one or more States concerned. The principle of cooperation means that it is preferable that such requests be made by all States concerned. The fact, however, that all States concerned do not seek necessary assistance does not free individual States from the obligation to seek assistance. Of course, the response and type of involvement of an international organization in cases in which the request has been lodged by only one State will depend, for instance, on the nature of the request, the type of assistance involved and the place where the international organization would have to perform such assistance.

Article 5

Implementation

> States concerned shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present articles.

Commentary

(1) This article states what might be thought to be the obvious, viz., that under the present articles, States are required to take the necessary measures of implementation, whether of a legislative, administrative or other character. Article 5 has been included here to emphasize the continuing character of the obligations, which require action to be taken from time to time to prevent transboundary harm or at any event to minimize the risk thereof arising from activities to which the articles apply.[939]

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[939] This article is similar to paragraph 2 of article 2 of the Convention on Environmental Impact Assessment in a Transboundary Context, which reads: "Each Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including, with respect to proposed activities listed in appendix I that are likely to cause significant adverse transboundary impact, the establishment of an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation described in appendix II" (see footnote 908 above).

(2) The measures referred to in this article include, for example, the opportunity to persons concerned to make representations or the establishment of quasi-judicial procedures. The use of the term "other action" is intended to cover the variety of ways and means by which States could implement the present articles. Article 5 mentions some measures expressly only in order to give guidance to States; it is left up to them to decide upon necessary and appropriate measures. Reference is made to "suitable monitoring mechanisms" in order to highlight the measures of inspection which States generally adopt in respect of hazardous activities.

(3) To say that States must take the necessary measures does not mean that they must themselves get involved in operational issues relating to the activities to which article 1 applies. Where these activities are conducted by private persons or enterprises, the obligation of the State is limited to establishing the appropriate regulatory framework and applying it in accordance with these articles. The application of that regulatory framework in the given case will then be a matter of ordinary administration or, in the case of disputes, for the relevant courts or tribunals, aided by the principle of non-discrimination contained in article 15.

(4) The action referred to in article 5 may appropriately be taken in advance. Thus States may establish a suitably monitoring mechanism before the activity in question is approved or instituted.

Article 6

Authorization

1. The State of origin shall require its prior authorization for:

(*a*) Any activity within the scope of the present articles carried out in its territory or otherwise under its jurisdiction or control;

(*b*) Any major change in an activity referred to in subparagraph (*a*);

(*c*) Any plan to change an activity which may transform it into one falling within the scope of the present articles.

2. The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present articles. Authorizations already issued by the State for pre-existing activities shall be reviewed in order to comply with the present articles.

3. In case of a failure to conform to the terms of the authorization, the State of origin shall take such actions as appropriate, including where necessary terminating the authorization.

Commentary

(1) This article sets forth the fundamental principle that the prior authorization of a State is required for activities which involve a risk of causing significant transboundary harm undertaken in its territory or otherwise under its jurisdiction or control. The word "authorization" means granting permission by governmental authorities to conduct an activity covered by these articles. States are free to choose the form of such authorization.

(2) The requirement of authorization noted in article 6, paragraph (1) (a) obliges a State to ascertain whether activities with a possible risk of significant transboundary harm are taking place in its territory or otherwise under its jurisdiction or control and implies that the State should take the measures indicated in these articles. It also requires the State to take a responsible and active role in regulating such activities. The Tribunal in the *Trail Smelter* arbitration held that Canada had "the duty ... to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined".[940] The Tribunal held that, in particular, "the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington".[941] Article 6 (1) (a) is compatible with this requirement.

(3) The International Court of Justice in the *Corfu Channel* case held that a State has an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other States".[942]

(4) The words "in its territory or otherwise under its jurisdiction or control" are taken from article 2. The expression "any activity within the scope of the present articles" introduces all the requirements specified in article 1 for an activity to fall within the scope of these articles.

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[940] See footnote 917 above, pp. 1965-1966.

[941] Ibid., p. 1966.

[942] *Corfu Channel* case, *Judgment of 9 April, 1949, I.C.J. Reports 1949*, p. 22.

(5) Article 6, paragraph (1) (b) makes the requirement of prior authorization applicable also for a major change planned in an activity already within the scope of article 1 where that change may increase the risk or alter the nature or the scope of the risk. Some examples of major changes are: building of additional production capacities, large-scale employment of new technology in an existing activity, re-routing of motorways, express roads or re-routing airport runway. Changing investment and production (volume and type), physical structure or emissions and changes bringing existing activities to levels higher than the allowed threshold could also be considered as part of a major change.[943] Similarly, article 6, paragraph (1) (c) contemplates a situation where a change is proposed in the conduct of an activity that is otherwise innocuous, where the change would transform that activity into one which involves a risk of causing significant transboundary harm. The implementation of such a change would also require State authorization.

(6) Paragraph 2 of article 6 emphasizes that the requirement of authorization should be made applicable to all the pre-existing activities falling within the scope of the present articles, once a State adopts these articles. It might be unreasonable to require States when they assume the obligations under these articles to apply them immediately in respect of existing activities. A suitable period of time might be needed in that case for the operator of the activity to comply with the authorization requirements. The decision as to whether the activity should be stopped pending authorization or should continue while the operator goes through the process of obtaining authorization is left to the State of origin. In case the authorization is denied by the State of origin, it is assumed that the State of origin will stop the activity.

(7) The adjustment envisaged in paragraph 2 generally occurs whenever new legislative and administrative terms are put in place because of safety standards or new international standards or obligations which the State has accepted and needed to enforce.

(8) Paragraph 3 of article 6 notes the consequences of the failure of an operator to comply with the requirement of authorization. The State of origin, which has the main responsibility to monitor these activities, is given the necessary flexibility to ensure that the operator complies with the requirements involved. As appropriate, the State of origin shall terminate the authorization, and where appropriate prohibit the activity from taking place altogether.

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[943] See *Current Policies, Strategies and Aspects of Environmental Impact Assessment in a Transboundary Context* (United Nations publication, Sales No. E.96.II.E.11), p. 48.

Article 7

Assessment of risk

> Any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.

Commentary

(1) Under article 7, a State of origin, before granting authorization to operators to undertake activities referred to in article 1, should ensure that an assessment is undertaken of the risk of the activity causing significant transboundary harm. This assessment enables the State to determine the extent and the nature of the risk involved in an activity and consequently the type of preventive measures it should take.

(2) Although the assessment of risk in the *Trail Smelter* case may not directly relate to liability for risk, it nevertheless emphasized the importance of an assessment of the consequences of an activity causing significant risk. The tribunal in that case indicated that the study undertaken by well-established and known scientists was "probably the most thorough [one] ever made of any area subject to atmospheric pollution by industrial smoke".[944]

(3) The requirement of article 7 is fully consonant with principle 17 of the Rio Declaration on Environment and Development, which provides also for assessment of risk of activities that are likely to have a significant adverse impact on the environment:

> "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."[945]

The requirement of assessment of adverse effects of activities has been incorporated in various forms in many international agreements.[946] The most notable is the Convention on

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[944] Op. cit., see footnote 917 above, pp. 1973-1974.

[945] See footnote 902 above.

[946] See, for example, article XI of the Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution, United Nations, *Treaty Series*, vol. 1140, p. 133; articles 205 and 206 of the United Nations Convention on the Law of the Sea (see footnote 913 above); the Jeddah Regional Convention for the Conservation of the Regional Environment of the Red Sea and Gulf of Aden, UNEP, *Selected Multilateral Treaties in the*

Environmental Impact Assessment in a Transboundary Context of 25 February 1991.[947]

(4) The practice of requiring an environmental impact assessment (EIA) has become very prevalent in order to assess whether a particular activity has the potential of causing significant transboundary harm. The legal obligation to conduct an environmental impact assessment under national law was first developed in the United States of America in the 1970s. Later, Canada and Europe adopted the same approach and essentially regulated it by guidelines. In 1985, a European Community directive required member States to conform to a minimum requirement of EIA. Since then many other countries have also made EIA a necessary condition their national law before authorization is granted for developmental but hazardous industrial activities.[948] According to one United Nations study, the EIA has already shown its value for implementing and strengthening sustainable development, as it combines the precautionary principle with the principle of preventing environmental damage and also allows for public participation.[949]

Field of Environment, vol. 2 (1991), p. 144; article 14 of the ASEAN Agreement on the Conservation of Nature and Natural Resources, UNEP, ibid., p. 343; Convention for the Protection of the Natural Resources and Environment of the South-Pacific Region, ILM, vol. 26 (1987), p. 41; article 4 of the Convention on the Regulation of Antarctic Mineral Resources Activities (see footnote 919 above); article 8 of the Protocol on Environmental Protection to the Antarctic Treaty, ILM, vol. 30 (1991), p. 1461; article 14 (1) (a) and (b) of the Convention on Biological Diversity (see footnote 913 above); and article 4 of the Convention on the Transboundary Effects of Industrial Accidents (see footnote 908 above).

[947] See footnote 908 above.

[948] For a survey of various North American and European legal and administrative systems of EIA policies, plans and programmes, see *Application of Environmental Impact Assessment Principles to Policies, Plans and Programmes* (United Nations publication, Sales No. E.92.II.E.28), pp. 42-43; approximately 70 developing countries have EIA legislation of some kind. Other countries either are in the process of drafting new and additional EIA legislation or are planning to do so. See M. Yeater and L. Kurukulasuriya, "Environmental Impact Assessment Legislation in Developing Countries", in Sun Lin and Lal Kurukulasuriya (eds.), *UNEP's New Way Forward: Environmental Law and Sustainable Development* (UNEP, 1995), p. 259; G.J. Martin "Le concept de risque et la protection de l'environnement: évolution parallèle ou fertilisation croisée?" in *Les Hommes et l'environnement, en hommage à Alexandre Kiss*, (Paris, Frison-Roche, 1998), pp. 451-460.

[949] See *Current Policies, Strategies and Aspects of* …, see footnote 943 above.

(5) The question of who should conduct the assessment is left to States. Such assessment is normally conducted by operators observing certain guidelines set by the States. These matters would have to be resolved by the States themselves through their domestic laws or as parties to international instruments. However, it is presumed that a State of origin will designate an authority, whether or not governmental, to evaluate the assessment on behalf of the Government and will accept responsibility for the conclusions reached by that authority.

(6) The article does not specify what the content of the risk assessment should be. Obviously the assessment of risk of an activity can only be meaningfully prepared if it relates the risk to the possible harm to which the risk could lead. This corresponds to the basic duty contained in article 3. Most existing international conventions and legal instruments do not specify the content of assessment. There are exceptions, such as the Convention on Environmental Impact Assessment in a Transboundary Context, which provides in detail the content of such assessment.[950] The 1981 study of the legal aspects concerning the environment related to offshore mining and drilling within the limits of national jurisdiction, prepared by the Working Group of Experts on Environmental Law of UNEP,[951] also provides, in its conclusion No. 8, in detail the content of assessment for offshore mining and drilling.

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[950] Article 4 of the Convention (footnote 908 above) provides that the environmental impact assessment of a State party should contain, at a minimum, the information described in appendix II to the Convention. Appendix II ("Content of the environmental impact assessment documentation") lists nine items as follows: (a) A description of the proposed activity and its purpose; (b) A description, where appropriate, of reasonable alternatives (for example, location or technological) to the proposed activity and also the no-action alternative; (c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives; (d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance; (e) A description of mitigation measures to keep adverse environmental impact to a minimum; (f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used; (g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information; (h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and (i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.).

[951] See UNEP/GC.9/5/Add.5, annex III.

(7) The specifics of what ought to be the content of assessment is left to the domestic laws of the State conducting such assessment.[952] For the purposes of article 7, however, such an assessment should contain an evaluation of the possible transboundary harmful impact of the activity. In order for the States likely to be affected to evaluate the risk to which they might be exposed, they need to know what possible harmful effects that activity might have on them.

(8) The assessment should include the effects of the activity not only on persons and property, but also on the environment of other States. The importance of the protection of the environment, independently of any harm to individual human beings or property is clearly recognized.

(9) This article does not oblige the State of origin to require risk assessment for any activity being undertaken within their territory or otherwise under their jurisdiction or control. Activities involving a risk of causing significant transboundary harm have some general characteristics which are identifiable and could provide some indication to States as to which activities might fall within the terms of these articles. For example, the type of the source of energy used in manufacturing, the location of the activity and its proximity to the border area, etc. could all give an indication of whether the activity might fall within the scope of these articles. There are certain substances that are listed in some conventions as dangerous or hazardous and their use in any activity may in itself be an indication that those activities might involve a risk of significant transboundary harm.[953] There are also certain conventions that list the activities that are presumed to be harmful and that might signal that those activities might fall within the scope of these articles.[954]

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[952] For the format of EIA adopted in most legislations, see M. Yeater and L. Kurukulasuriya, (footnote 948 above) p. 260.

[953] For example, Convention for the Prevention of Marine Pollution from Land-based Sources (footnote 908 above) provides in article 4 an obligation for the parties to eliminate or restrict the pollution of the environment by certain substances and the list of those substances is annexed to the Convention, 1983, p. 430. Similarly, the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area provides a list of hazardous substances in annex I and of noxious substances and materials in annex II, deposits of which are either prohibited or strictly limited, (footnote 908 above); see also the Protocol to the 1976 Convention for the Protection of the Mediterranean Sea against Pollution, (footnote 908 above); and the Convention for the Protection of the Rhine against Chemical Pollution, United Nations, *Treaty Series*, vol. 1124, p. 375.

[954] See footnote 908 above.

Article 8

Notification and information

1. If the assessment referred to in article 7 indicates a risk of causing significant transboundary harm, the State of origin shall provide the State likely to be affected with timely notification of the risk and the assessment and shall transmit to it the available technical and all other relevant information on which the assessment is based.

2. The State of origin shall not take any decision on authorization of the activity pending the receipt, within a period not exceeding six months, of the response from the State likely to be affected.

Commentary

(1) Article 8 deals with a situation in which the assessment undertaken by a State of origin, in accordance with article 7, indicates that the activity planned does indeed pose a risk of causing significant transboundary harm. This article, together with articles 9, 11, 12 and 13, provides for a set of procedures essential to balancing the interests of all the States concerned by giving them a reasonable opportunity to find a way to undertake the activity with satisfactory and reasonable measures designed to prevent or minimize transboundary harm.

(2) Article 8 calls on the State of origin to notify States likely to be affected by the planned activity. The activities here include both those that are planned by the State itself and those planned by private entities. The requirement of notification is an indispensable part of any system designed to prevent transboundary harm or at any event to minimize the risk thereof.

(3) The obligation to notify other States of the risk of significant harm to which they are exposed is reflected in the *Corfu Channel* case, where the International Court of Justice characterized the duty to warn as based on "elementary considerations of humanity".[955] This principle is recognized in the context of the use of international watercourses and in that context is embodied in a number of international agreements, decisions of international courts and

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[955] See footnote 942 above, p. 22.

tribunals, declarations and resolutions adopted by intergovernmental organizations, conferences and meetings, and studies by intergovernmental and international non-governmental organizations.[956]

(4) In addition to the utilization of international watercourses, the principle of notification has also been recognized in respect of other activities with transboundary effects, for example, article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context[957] and articles 3 and 10 of the Convention on the Transboundary Effects of Industrial Accidents.[958] Principle 19 of the Rio Declaration on Environment and Development speaks of timely notification:

> "States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith."[959]

(5) The procedure for notification has been established by a number of OECD resolutions. For example, in respect of certain chemical substances, OECD resolution C (71) 73 of 18 May 1971 stipulates that each member State is to receive notification prior to the proposed measures in each other member State regarding substances which have an adverse impact on man or the environment where such measures could have significant effects on the economies

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[956] For treaties dealing with prior notification and exchange of information in respect of watercourses, see paragraph (6) of the commentary to article 12 "Notification concerning planned measures with possible adverse effects", of the draft articles on the law of the non-navigational uses of international watercourses, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), Chap. III.D, part III.

[957] Article 3 (2) of the Convention provides for a system of notification which reads: the notification shall contain, *inter alia*: (a) information on the proposed activity, including any available information on its possible transboundary impact; (b) the nature of the possible decision; and (c) an indication of a reasonable time within which a response under paragraph 3 of this article is required, taking into account the nature of the proposed activity, and may include the information set out in paragraph 5 of this article. See footnote 908 above.

[958] See footnote 908 above.

[959] See footnote 902 above.

and trade of the other States.[960] OECD resolution C (74) 224 of 14 November 1974 on the "Principles concerning transfrontier pollution" in its "Principle of information and consultation" requires notification and consultation prior to undertaking an activity which may create a risk of significant transboundary pollution.[961] The principle of notification is well established in the case of environmental emergencies.[962]

(6) Where assessment reveals the risk of causing significant transboundary harm, in accordance with paragraph 1, the State which plans to undertake such activity has the obligation to notify the States which may be affected. The notification shall be accompanied by available technical information on which the assessment is based. The reference to "available" technical and other relevant information is intended to indicate that the obligation of the State of origin is limited to transmitting the technical and other information which was developed in relation to the activity. This information is generally revealed during the assessment of the activity in accordance with article 7. Paragraph 1 assumes that technical information resulting from the assessment includes not only what might be called raw data, namely fact sheets, statistics, etc., but also the analysis of the information which was used by the State of origin itself to make the determination regarding the risk of transboundary harm. The reference to the available data includes also other data which might become available later after transmitting the data which was initially available to the States likely to be affected.

(7) States are free to decide how they wish to inform the States that are likely to be affected. As a general rule, it is assumed that States will directly contact the other States through diplomatic channels.

(8) Paragraph 1 also addresses the situation where the State of origin, despite all its efforts and diligence, is unable to identify all the States which may be affected prior to authorizing the activity and gains that knowledge only after the activity is undertaken. In accordance with this paragraph, the State of origin, in such cases, is under an obligation to notify the other States likely to be affected as soon as the information comes to its knowledge and it has had an opportunity, within a reasonable time, to determine the States concerned.

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[960] OECD, *OECD and the Environment*, Paris, 1986, p. 89, para. 4 of the annex.

[961] Ibid., p. 142.

[962] See paragraph (1) of commentary to article 17.

(9) Paragraph 2 addresses the need for the States likely to be affected to respond within a period not exceeding six months. It is generally a period of time that should allow these States to evaluate the data involved and arrive at their own conclusion. This is a requirement that is conditioned by cooperation and good faith.

Article 9

Consultations on preventive measures

> 1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof. The States concerned shall agree, at the commencement of such consultations, on a reasonable time frame for the consultations.
>
> 2. The States concerned shall seek solutions based on an equitable balance of interests in the light of article 10.
>
> 3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued, without prejudice to the rights of any State likely to be affected.

Commentary

(1) Article 9 requires the States concerned, that is, the State of origin and the States that are likely to be affected, to enter into consultations in order to agree on the measures to prevent significant transboundary harm, or at any event to minimize the risk thereof. Depending upon the time at which article 9 is invoked, consultations may be prior to authorization and commencement of an activity or during its performance.

(2) There is a need to maintain a balance between two equally important considerations in this article. First, the article deals with activities that are not prohibited by international law and that, normally, are important to the economic development of the State of origin. Second, it would be unfair to other States to allow those activities to be conducted without consulting them and taking appropriate preventive measures. Therefore, the article does not provide a mere formality which the State of origin has to go through with no real intention of reaching a solution acceptable to the other States, nor does it provide a right of veto for the States that are likely to be affected. To maintain a balance, the article relies on the manner in which, and purpose for which, the parties enter into consultations. The parties must enter into consultations in good

faith and must take into account each other's legitimate interests. The parties should consult each other with a view to arriving at an acceptable solution regarding the measures to be adopted to prevent significant transboundary harm, or at any event to minimize the risk thereof.

(3) The principle of good faith is an integral part of any requirement of consultations and negotiations. The obligation to consult and negotiate genuinely and in good faith was recognized in the *Lake Lanoux* award where the tribunal stated that:

> "Consultations and negotiations between the two States must be genuine, must comply with the rules of good faith and must not be mere formalities. The rules of reason and good faith are applicable to procedural rights and duties relative to the sharing of the use of international rivers."[963]

(4) With regard to this particular point about good faith, the judgment of the International Court of Justice in the *Fisheries Jurisdiction (United Kingdom v. Iceland)* case is also relevant. There the Court stated that "[t]he task [of the parties] will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other".[964] In the *North Sea Continental Shelf* cases (*Federal Republic of Germany/Denmark* and *Federal Republic of Germany/Netherlands*)[965] the Court held that:

> "(a) [T]he parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it."[966]

Even though the Court in this judgment speaks of "negotiations", it is believed that the good faith requirement in the conduct of the parties during the course of consultation or negotiations is the same.

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[963] See footnote 918 above.

[964] *I.C.J. Reports 1974*, para. 78.

[965] *I.C.J. Reports 1969*, p. 3, especially paras. 85 and 87.

[966] Ibid, para. 85.

(5) The purpose of consultations is for the parties to find acceptable solutions regarding measures to be adopted in order to prevent significant transboundary harm, or at any event to minimize the risk thereof. The words "acceptable solutions", regarding the adoption of preventive measures, refers to those measures that are accepted by the parties within the guidelines specified in paragraph 2. Generally, the consent of the parties on measures of prevention will be expressed by means of some form of agreement.

(6) The parties should obviously aim, first, at selecting those measures which may avoid any risk of causing significant transboundary harm or, if that is not possible, which minimize the risk of such harm. Under the terms of article 4, the parties are required, moreover, to cooperate in the implementation of such measures. This requirement, again, stems from the assumption that the obligation of due diligence, the core base of the provisions intended to prevent significant transboundary harm, or at any event to minimize the risk thereof, is of a continuous nature affecting every stage related to the conduct of the activity.

(7) Article 9 may be invoked whenever there is a question about the need to take preventive measures. Such questions obviously may arise as a result of article 8, because a notification to other States has been made by the State of origin that an activity it intends to undertake may pose a risk of causing significant transboundary harm, or in the course of the exchange of information under article 12 or in the context of article 11 on procedures in the absence of notification.

(8) Article 9 has a broad scope of application. It is to apply to all issues related to preventive measures. For example, when parties notify under article 8 or exchange information under article 12 and there are ambiguities in those communications, a request for consultations may be made simply in order to clarify those ambiguities.

(9) Paragraph 2 provides guidance for States when consulting each other on preventive measures. The parties shall seek solutions based on an equitable balance of interests in the light of article 10. Neither paragraph 2 of this article nor article 10 precludes the parties from taking account of other factors which they perceive as relevant in achieving an equitable balance of interests.

(10) Paragraph 3 deals with the possibility that, despite all efforts by the parties, they cannot reach an agreement on acceptable preventive measures. As explained in paragraph (3) above, the article maintains a balance between the two considerations, one of which is to deny the States likely to be affected a right of veto. In this context, the *Lake Lanoux* award may be recalled where the tribunal noted that, in certain situations, the party that was likely to be affected might,

in violation of good faith, paralyse genuine negotiation efforts.[967] To take account of this possibility, the article provides that the State of origin is permitted to go ahead with the activity, for the absence of such an alternative would, in effect, create a right of veto for the States likely to be affected. The State of origin, while permitted to go ahead with the activity, is still obligated, as measure of self-regulation, to take into account the interests of the States likely to be affected. As a result of consultations, the State of origin is aware of the concerns of the States likely to be affected and is in a better position to seriously take them into account in carrying out the activity. The last part of paragraph 3 preserves the rights of States likely to be affected.

Article 10

Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 9, the States concerned shall take into account all relevant factors and circumstances, including:

(*a*) The degree of risk of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm;

(*b*) The importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the State likely to be affected;

(*c*) The risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment;

(*d*) The degree to which the State of origin and, as appropriate, the State likely to be affected are prepared to contribute to the costs of prevention;

(*e*) The economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(*f*) The standards of prevention which the State likely to be affected applies to the same or comparable activities and the standards applied in comparable regional or international practice.

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[967] See footnote 918 above, p. 128.

Commentary

(1) The purpose of this article is to provide some guidance for States which are engaged in consultations seeking to achieve an equitable balance of interests. In reaching an equitable balance of interests, the facts have to be established and all the relevant factors and circumstances weighed. This article draws its inspiration from article 6 of the Convention on the Law of the Non-navigational Uses of International Watercourses.

(2) The main clause of the article provides that in order "to achieve an equitable balance of interests as referred to in paragraph 2 of article 9, the States concerned shall take into account all relevant factors and circumstances". The article proceeds to set forth a non-exhaustive list of such factors and circumstances. The wide diversity of types of activities which is covered by these articles, and the different situations and circumstances in which they will be conducted, make it impossible to compile an exhaustive list of factors relevant to all individual cases. No priority or weight is assigned to the factors and circumstances listed, since some of them may be more important in certain cases while others may deserve to be accorded greater weight in other cases. In general, the factors and circumstances indicated will allow the parties to compare the costs and benefits which may be involved in a particular case.

(3) Subparagraph (a) compares the degree of risk of significant transboundary harm to the availability of means of preventing such harm or minimizing the risk thereof and the possibility of repairing the harm. For example, the degree of risk of harm may be high, but there may be measures that can prevent the harm or reduce that risk, or there may be possibilities for repairing the harm. The comparisons here are both quantitative and qualitative.

(4) Subparagraph (b) compares the importance of the activity in terms of its social, economic and technical advantages for the State of origin and the potential harm to the States likely to be affected. The Commission in this context recalls the decision in the *Donauversinkung* case where the court stated that:

> "The interests of the States in question must be weighed in an equitable manner one against another. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by the one to the injury caused to the other."[968]

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[968] *Wurttemberg and Prussia v. Baden* (*Donauversinkung* case) (1927) in Entscheidungen des Reichsgerichts in Zivilsachen (Berlin, de Gruyter), vol. 116, Appendix, pp. 18-45 (1927), in

In more recent times, States have negotiated what might be seen as equitable solutions to transboundary disputes; agreements concerning French potassium emissions into the Rhine, pollution of U.S.-Mexican boundary waters, and North American and European acid rain all display elements of this kind.[969]

(5) Subparagraph (c) compares, in the same fashion as subparagraph (a), the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof and the possibility of restoring the environment. It is necessary to emphasize the particular importance of protection of the environment. Principle 15 of the Rio Declaration is relevant to this subparagraph. Requiring that the precautionary approach be widely applied to States according to their capabilities, principle 15 states: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[970]

(6) The precautionary principle was affirmed in the "pan-European" Bergen Declaration adopted on 15 May 1990 by the member States of the United Nations Economic Commission for Europe. It stated that "Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent

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Annual Digest of Public International Law Cases, (1927-1928) (London, 1931), p. 131. See also *Kansas v. Colorado* (1907) 206 US 100, *Washington v. Oregon* (1936) 297 US 517.

[969] See the Convention for the Protection of the Rhine from Pollution by Chlorides, United Nations, *Treaty Series*, vol. 1404, p. 90, reprinted in ILM, vol. 16 (1977), p. 265, with 1991 Protocol. The 1973 Agreement on the Permanent and Definitive Solution of the International Problem of the Salinity of the Colorado River, ILM, vol. 12 (1973), p. 1105; the Convention on Long-Range Transboundary Air Pollution, United Nations, *Treaty Series*, vol. 1302, p. 217, reprinted in ILM, vol. 18 (1979), p. 1442; the Agreement between the United States and Canada on Air Quality, United Nations, *Treaty Series*, vol. 1852, p. 79, reprinted in ILM, vol. 30 (1991), p. 678. See also A. Boyle and D. Freestone (footnote 907 above), p. 80 and I. Romy, *Les pollutions transfrontières des eaux: "l'exemple du Rhin"* (Lausanne, Payot, 1990).

[970] See footnote 902 above.

environmental degradation."[971] The precautionary principle was recommended by the UNEP Governing Council in order to promote the prevention and elimination of marine pollution, which is increasingly becoming a threat to the marine environment and a cause of human suffering.[972] The precautionary principle has also been referred to or incorporated without any explicit reference in various other conventions.[973]

(7) According to the Rio Declaration, the precautionary principle constitutes a very general rule of conduct of prudence. It implies the need for States to review their obligations of prevention in a continuous manner to keep abreast with the advances in scientific knowledge.[974] The International Court of Justice in its judgment of 25 September 1997 in the

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[971] "Report of the Economic Commission for Europe on the Bergen Conference (8-16 May 1990)", A/CONF.151/PC/10, annex I, para. 7.

[972] Governing Council decision 15/27 (1989); see *Official Records of the General Assembly, Forty-fourth Session, Supplement No.25* (A/44/25), annex I. See also P. Sands, op. cit., see footnote 907 above, p. 210.

[973] See article 4, paragraph 3 of the Bamako Convention on the Ban of the Import and the Control of Transboundary Movement of Hazardous Wastes within Africa (ILM, vol. 30 (1991), p. 775); article 3, paragraph 3 of the United Nations Framework Convention on Climate Change (United Nations, *Treaty Series*, vol. 1771, p. 107, reprinted in ILM, vol. 31 (1992), p. 848); article 174 (ex-article 130r) of the Treaty establishing the European Community (*Official Journal of the European Union*, C340, 10 November 1997, pp. 173-308); and article 2 of the Vienna Convention for the Protection of the Ozone Layer (see footnote 925 above). It may be noted that previous treaties apply the precautionary principle in a very general sense without making any explicit reference to it.

[974] On the principle of precaution generally see H. Hohmann, *Präventive Rechtspflichten und -prinzipien des modernen Umweltvölkerrechts: Zum Stand des Umweltvölkerrechts zwischen Umweltnutzung und Umweltschutz* (Berlin, Duncker und Humblot, 1992), pp. 406-411; J. Cameron, "The status of the Precautionary Principle in International Law" in O'Riodan and Cameron (eds.), *Interpreting the Precautionary Principle* (1994), pp. 262-289; H. Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law: The Precautionary Principle: International Environmental Law between Exploitation and Protection* (1994); D. Freestone and Hey (eds.), *The Precautionary Principle and International Law: The Challenge of Implementation* (1996), p. 274; A. Epiney and M. Scheyli (see footnote 924 above), pp. 103-125; P. Martin-Bidou, "Le principe de précaution en droit international de l'environnement", in *Revue générale de droit international public*, 1999-3, pp. 631-665; and E. Zaccai and J.N. Missa (ed.), *Le principe de précaution, Significations et conséquences*, (Edition de l'Université de Bruxelles, 2000), pp. 117-142.

Gabčíkovo-Nagymaros Project case invited the Parties to "look afresh at the effects on the environment of the operation of the Gabčíkovo power plant", built on the Danube pursuant to a 1977 treaty, in the light of the new requirements of environmental protection.[975]

(8) States should consider suitable means to restore, as far as possible, the situation existing prior to the occurrence of harm. It is considered that this should be highlighted as a factor to be taken into account by States concerned which should adopt environmentally friendly measures.

(9) Subparagraph (d) provides that one of the elements determining the choice of preventive measures is the willingness of the State of origin and States likely to be affected to contribute to the cost of prevention. For example, if the States likely to be affected are prepared to contribute to the expense of preventive measures, it may be reasonable, taking into account other factors, to expect the State of origin to take more costly but more effective preventive measures. This however should not underplay the measures the State of origin is obliged to take under these articles.

(10) These considerations are in line with the basic policy of the so-called polluter-pays principle. This principle was initiated first by the Council of OECD in 1972.[976] The polluter-pays principle was given cognizance at the global level when it was adopted as principle 16 of the Rio Declaration. It noted:

> "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."[977]

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[975] *I.C.J. Reports 1997*, pp. 77-78, para. 140. However in this case the Court did not accept Hungary's claim that it was entitled to terminate the Treaty on the grounds of "ecological state of necessity" arising from risks to the environment that had not been detected at the time of its conclusion. It stated that other means could be used to remedy the vague "peril", see paras. 49-58 of the judgment, ibid., pp. 39-46.

[976] OECD, Environment Directive on equal right of access and non-discrimination in relation to transfrontier pollution, 1986, cited in "Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law", *Yearbook ... 1995*, vol. II (Part One), document A/CN.4/471, para. 102.

[977] See footnote 902 above.

This is conceived as the most efficient means of allocating the cost of pollution prevention and control measures so as to encourage the rational use of scarce resources. It also encourages internalization of the cost of publicly mandated technical measures in preference to inefficiencies and competitive distortions in governmental subsidies.[978] This principle is specifically referred to in article 174 (ex-article 130r) of the Treaty establishing the European Community.

(11) The expression "as appropriate" indicates that the State of origin and the States likely to be affected are not put on the same level as regards the contribution to the costs of prevention. States concerned frequently embark on negotiations concerning the distribution of costs for preventive measures. In so doing, they proceed from the basic principle derived from article 3 according to which these costs are to be assumed by the operator or the State of origin. These negotiations mostly occur in cases where there is no agreement on the amount of the preventive measures and where the affected State contributes to the costs of preventive measures in order to ensure a higher degree of protection that it desires over and above what is essential for the State of origin to ensure. This link between the distribution of costs and the amount of preventive measures is in particular reflected in subparagraph (d).

(12) Subparagraph (e) introduces a number of factors that must be compared and taken into account. The economic viability of the activity must be compared to the costs of prevention. The cost of the preventive measures should not be so high as to make the activity economically non-viable. The economic viability of the activity should also be assessed in terms of the possibility of changing the location, or conducting it by other means, or replacing it with an alternative activity. The words "carrying out the activity ... by other means" intend to take into account, for example, a situation in which one type of chemical substance used in the activity, which might be the source of transboundary harm, could be replaced by another chemical substance; or mechanical equipment in the plant or the factory could be replaced by different

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[978] See Gerhard Hafner, "Das Verursacherprinzip", *Economy-Fachmagazin* No. 4/90 (1990), pp. F23-F29; S.E. Gaines, "The Polluter-Pays Principle: Free Market Equity to Environmental Ethos", *Texas International Law Journal*, vol. 26 (1991), p. 470; H. Smets, "Polluter-Pays Principle in the Early 1990s", in L. Campiglio et al. *The Environment After Rio: International Law and Economics* (Graham and Trotman, 1994), p. 134; "Survey of liability regimes ..." (see footnote 926 above), para. 113; Report of the Secretary-General, "Rio Declaration on Environment and Development: application and implementation", E/CN.17/1997/8, paras. 87-90; and A. Epiney and M. Scheyli, *Strukturprinzipien des Umweltvölkerrechts* (see footnote 924 above), p. 152.

equipment. The words "replacing [the activity] with an alternative activity" are intended to take account of the possibility that the same or comparable results may be reached by another activity with no risk, or lower risk, of significant transboundary harm.

(13) Subparagraph (f). States should also take into account the standards of prevention applied to the same or comparable activities in the State likely to be affected, other regions or, if they exist, the international standards of prevention applicable for similar activities. This is particularly relevant when, for example, the States concerned do not have any standard of prevention for such activities, or they wish to improve their existing standards.

Article 11

Procedures in the absence of notification

> 1. If a State has reasonable grounds to believe that an activity planned or carried out in the State of origin may involve a risk of causing significant transboundary harm to it, it may request the State of origin to apply the provision of article 8 The request shall be accompanied by a documented explanation setting forth its grounds.
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> 2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article 8, it shall so inform the requesting State within a reasonable time, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy that State, at its request, the two States shall promptly enter into consultations in the manner indicated in article 9.
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> 3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a reasonable period.

Commentary

(1) Article 11 addresses the situation in which a State, although it has received no notification about an activity in accordance with article 8, becomes aware that an activity is being carried out in the State of origin, either by the State itself or by a private operator, and believes, on reasonable grounds, that the activity carries a risk of causing it significant harm.

(2) The expression "a State" is not intended to exclude the possibility that more than one State could entertain the belief that a planned activity could adversely affect them in a significant way. The words "apply the provision of article 8" should not be taken as suggesting that the State which intends to authorize or has authorized an activity has necessarily failed to comply with its obligations under article 8. In other words, the State of origin may have made an assessment of the potential of the planned activity for causing significant transboundary harm

and concluded in good faith that no such effects would result therefrom. Paragraph 1 allows a State to request that the State of origin take a "second look" at its assessment and conclusion, and does not prejudge the question whether the State of origin initially complied with its obligations under article 8.

(3) State likely to be affected could make such a request, however, only upon satisfaction of two conditions. The first is that the requesting State must have "reasonable grounds to believe" that the activity in question may involve a risk of causing significant transboundary harm. The second is that the requesting State must provide a "documented explanation setting forth its grounds". These conditions are intended to require that the requesting State have more than a vague and unsubstantiated apprehension. A serious and substantiated belief is necessary, particularly in view of the possibility that the State of origin may be required to suspend implementation of its plans under paragraph 3 of article 11.

(4) The first sentence of paragraph 2 deals with the case in which the planning State concludes, after taking a "second look" as described in paragraph (2) of the present commentary, that it is not under an obligation to provide a notification under article 8. In such a situation, paragraph 2 seeks to maintain a fair balance between the interests of the States concerned by requiring the State of origin to provide the same kind of justification for its finding as was required of the requesting State under paragraph 1. The second sentence of paragraph 2 deals with the case in which the finding of the State of origin does not satisfy the requesting State. It requires that, in such a situation, the State of origin promptly enters into consultations with the other State (or States), at the request of the latter. The consultations are to be conducted in the manner indicated in paragraphs 1 and 2 of article 9. In other words, their purpose is to achieve "acceptable solutions" regarding measures to be adopted in order to prevent significant transboundary harm or at any event to minimize the risk thereof, and that the solutions to be sought should be "based on an equitable balance of interests". These phrases are discussed in the commentary to article 9.

(5) Paragraph 3 requires the State of origin to introduce appropriate and feasible measures to minimize the risk, and where appropriate, to suspend the activity in question for a reasonable period, if it is requested to do so by the other State during the course of consultations. States concerned could also agree otherwise.

(6) Similar provisions have been provided for in other legal instruments. Article 18 of the Convention on the Law of the Non-navigational Uses of International Watercourses,[979] and article 3, paragraph 7, of the Convention on Environmental Impact Assessment in a Transboundary Context[980] also contemplate a procedure by which a State likely to be affected by an activity can initiate consultations with the State of origin.

Article 12

Exchange of information

> While the activity is being carried out, the States concerned shall exchange in a timely manner all available information concerning that activity relevant to preventing significant transboundary harm or at any event minimizing the risk thereof. Such an exchange of information shall continue until such time as the States concerned consider it appropriate even after the activity is terminated.

Commentary

(1) Article 12 deals with steps to be taken *after* an activity has been undertaken. The purpose of all these steps is the same as previous articles, viz., to prevent significant transboundary harm or at any event to minimize the risk thereof.

(2) Article 12 requires the State of origin and the likely affected States to exchange information regarding the activity after it has been undertaken. The phrase "concerning that activity" after the words "all available information", is intended to emphasize the link between the information and the activity and not any information. The duty of prevention based on the concept of due diligence is not a one-time effort but requires continuous effort. This means that due diligence is not terminated after granting authorization for the activity and undertaking the activity; it continues in respect of monitoring the implementation of the activity as long as the activity continues.

(3) The information that is required to be exchanged, under article 12, is whatever would be useful, in the particular instance, for the purpose of prevention of risk of significant harm. Normally such information comes to the knowledge of the State of origin. However, when the State that is likely to be affected has any information which might be useful for prevention purposes, it should make it available to the State of origin.

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[979] See footnote 919 above.

[980] See footnote 908 above.

(4) The requirement of exchange of information is fairly common in conventions designed to prevent or reduce environmental and transboundary harm. These conventions provide for various ways of gathering and exchanging information, either between the parties or through providing the information to an international organization which makes it available to other States.[981] In the context of these articles, where the activities are most likely to involve a few States, the exchange of information is effected between the States directly concerned. Where the information might affect a large number of States, relevant information may be exchanged through other avenues, such as for example, competent international organizations.

(5) Article 12 requires that such information should be exchanged in a timely manner. This means that when the State becomes aware of such information, it should inform the other States quickly so that there will be enough time for the States concerned to consult on appropriate preventive measures or the States likely to be affected will have sufficient time to take proper actions.

(6) There is no requirement in the article as to the frequency of exchange of information. The requirement of article 12 comes into operation only when States have any information which is relevant to preventing transboundary harm or at any rate to minimize the risk thereof.

(7) The second sentence of article 12 is designed to ensure exchange of information under this provision not only while an activity is "carried out", but even after it ceases to exist, if the activity leaves behind by-products or materials associated with the activity which require monitoring to avoid the risk of significant transboundary harm. An example in this regard is

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[981] For example, article 10 of the Convention on the Protection of Marine Pollution from Land-based Sources (see footnote 908 above), article 200 of the United Nations Convention on the Law of the Sea (see footnote 913 above) and article 4 of the Vienna Convention for the Protection of the Ozone Layer (see footnote 925 above) speak of individual or joint research by the States parties on prevention or reduction of pollution and of transmitting to each other directly or through a competent international organization the information so obtained. The Convention on Long-Range Transboundary Air Pollution (see footnote 969 above) provides for research and exchange of information regarding the impact of activities undertaken by the States parties. Examples are found in other instruments such as article VI, para. 1 (iii), of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters (see footnote 916 above); article 17 of the Convention on Biological Diversity (see footnote 913 above); and article 13 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (see footnote 925 above).

nuclear activity which leaves behind nuclear waste even after the activity is terminated. But it is a recognition of the fact that the consequences of certain activities even after they are terminated continue to pose a significant risk of transboundary harm. Under these circumstances, the obligations of the State of origin do not end with the termination of the activity.

Article 13

Information to the public

> States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Commentary

(1) Article 13 requires States, whenever possible and by such means as are appropriate, to provide the public likely to be affected, whether their own or that of other States, with information relating to the risk and harm that might result from an activity to ascertain their views thereon. The article therefore requires States (a) to provide information to the public regarding the activity and the risk and the harm it involves, and (b) to ascertain the views of the public. It is, of course, clear that the purpose of providing information to the public is in order to allow its members to inform themselves and then to ascertain their views. Without that second step, the purpose of the article would be defeated.

(2) The content of the information to be provided to the public includes information about the activity itself as well as the nature and the scope of risk and harm that it entails. Such information is contained in the documents accompanying the notification which is effected in accordance with article 8 or in the assessment which may be carried out by the requesting State under article 11.

(3) This article is inspired by new trends in international law, in general, and environmental law, in particular, of seeking to involve, in the decision-making processes, individuals whose lives, health, property and environment might be affected by providing them with a chance to present their views and be heard by those responsible for making the ultimate decisions.

(4) Principle 10 of the Rio Declaration on Environment and Development provides for public involvement in decision-making processes as follows:

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."[982]

(5) A number of other recent international instruments dealing with environmental issues have required States to provide the public with information and to give it an opportunity to participate in decision-making processes. Article VII, paragraphs 1 and 2, of the Code of Conduct on Accidental Pollution of Transboundary Inland Waters is relevant in that context:

> "1. In order to promote informed decision-making by central, regional or local authorities in proceedings concerning accidental pollution of transboundary inland waters, countries should facilitate participation of the public likely to be affected in hearings and preliminary inquiries and the making of objections in respect of proposed decisions, as well as recourse to and standing in administrative and judicial proceedings.
>
> "2. Countries of incident should take all appropriate measures to provide physical and legal persons exposed to a significant risk of accidental pollution of transboundary inland waters with sufficient information to enable them to exercise the rights accorded to them by national law in accordance with the objectives of this Code."[983]

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[982] See footnote 902 above.

[983] See footnote 916 above.

Article 3, paragraph 8, of the Convention on Environmental Impact Assessment in a Transboundary Context;[984] article 17 of the Convention on the Protection of the Marine Environment of the Baltic Sea Area;[985] and article 6 of the United Nations Framework Convention on Climate Change;[986] the two 1992 Helsinki Conventions on the Protection and Use of Transboundary Watercourses and International Lakes[987] (article 16) and on the Transboundary Effects of Industrial Accidents (article 9 and annex VIII);[988] article 12 of the Convention on the Law of the Non-navigational Uses of International Watercourses; [989] the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters;[990] the European Council directives 90/313 on freedom of access to information on the environment[991] and 96/82 on the control of major accident hazards involving dangerous substances;[992] OECD Council recommendation C (74) 224 of 14 November 1974 on Principles concerning transfrontier pollution[993] all provide for information to the public.

(6) There are many modalities for participation in decision-making processes. Reviewing data and information on the basis of which decisions will be based and having an opportunity to confirm or challenge the accuracy of the facts, the analysis and the policy considerations either through administrative tribunals, courts, or groups of concerned citizens is one way of participation in decision-making. This form of public involvement enhances the efforts to prevent transboundary and environmental harm.

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[984] See footnote 908 above.

[985] See footnote 953 above.

[986] ILM, vol. 31 (1992), p. 851.

[987] See footnote 925 above.

[988] See footnote 908 above.

[989] See footnote 919 above.

[990] Doc. ECE/CEP/43.

[991] *Official Journal of the European Communities*, Series L, No. 158, 23 June 1990, p. 56.

[992] Ibid., No. 10, 14 January 1997, p. 13.

[993] See footnote 960 above.

(7) The obligation contained in article 13 is circumscribed by the phrase "by such means as are appropriate", which is intended to leave the ways in which such information could be provided to the States, their domestic law requirements and the State policy as to, for example, whether such information should be provided through media, non-governmental organizations, public agencies and local authorities. In the case of the public beyond a State's borders, information may be provided, as appropriate, through the good offices of the State concerned, if direct communication is not feasible or practical.

(8) Further, the State that might be affected, after receiving notification and information from the State of origin before responding to the notification shall, by such means as are appropriate, inform those parts of its own public likely to be affected.

(9) "Public" includes individuals, interest groups (non-governmental organizations) and independent experts. General "public" however refers to individuals who are not organized into groups or affiliated to specific groups. Public participation could be encouraged by holding public meetings or hearings. The public should be given the opportunity for consultation and their participation should be facilitated by providing them with necessary information on the proposed policy, plan or programme under consideration. It must however be understood that requirements of confidentiality may affect the extent of public participation in the assessment process. It is also common that the public is not involved or only minimally involved in efforts to determine the scope of a policy, plan or programme. Public participation in the review of a draft document or EIA would be useful in obtaining information regarding concerns related to the proposed action, additional alternatives and potential environmental impact.[994]

(10) Apart from the desirability of encouraging public participation in national decision-making on vital issues regarding development and the tolerance levels of harm in order to enhance the legitimacy of and compliance with the decisions taken, it is suggested that, given the development of human rights law, public participation could also be viewed as a growing right under national law as well as international law.[995]

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[994] *Application of Environmental Impact Assessment Principle* ... (footnote 948 above), pp. 4 and 8.

[995] See T.M. Franck "Fairness in the International Legal and Institutional System: General Course on Public International Law", *Recueil des cours* ... 1993-III, vol. 240, p. 110. See also Donna Craig and Diana Ponce Nava, "Indigenous Peoples' Rights and Environmental Law", in Sun Lin and Lal Kurukulasuriya (eds.) (footnote 948 above), pp. 115-146.

Article 14

National security and industrial secrets

> Data and information vital to the national security of the State of origin or to the protection of industrial secrets or concerning intellectual property may be withheld, but the State of origin shall cooperate in good faith with the State likely to be affected in providing as much information as possible under the circumstances.

Commentary

(1) Article 14 is intended to create a narrow exception to the obligation of States to provide information in accordance with articles 8, 12 and 13. States are not obligated to disclose information that is vital to their national security. This type of clause is not unusual in treaties which require exchange of information. Article 31 of the Convention on the Law of the Non-navigational Uses of International Watercourses[996] also provides for a similar exception to the requirement of disclosure of information vital to national defence or security.

(2) Article 14 includes industrial secrets and information protected by intellectual property in addition to national security. Although industrial secrets are a part of the intellectual property rights, both terms are used to give sufficient coverage to protected rights. In the context of these articles, it is highly probable that some of the activities which come within the scope of article 1 might involve the use of sophisticated technology involving certain types of information which are protected under the domestic law. Normally, domestic laws of States determine the information that is considered an industrial secret and provide protection for them. This type of safeguard clause is not unusual in legal instruments dealing with exchange of information relating to industrial activities. For example, article 8 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes[997] and article 2, paragraph 8, of the Convention on Environmental Impact Assessment in a Transboundary Context[998] provide for similar protection of industrial and commercial secrecy.

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[996] See footnote 919 above.

[997] See footnote 925 above.

[998] See footnote 908 above.

(3) Article 14 recognizes the need for balance between the legitimate interests of the State of origin and the States that are likely to be affected. It therefore requires the State of origin that is withholding information on the grounds of security or industrial secrecy to cooperate in good faith with the other States in providing as much information as possible under the circumstances. The words "as much information as possible" include, for example, the general description of the risk and the type and the extent of harm to which a State may be exposed. The words "under the circumstances" refer to the conditions invoked for withholding the information. Article 14 essentially encourages and relies on the good faith cooperation of the parties.

Article 15

Non-discrimination

> Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of an activity within the scope of the present articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.

Commentary

(1) This article sets out the basic principle that the State of origin is to grant access to its judicial and other procedures without discrimination on the basis of nationality, residence or the place where the injury might occur. The content of this article is based on article 32 of the Convention on the Law of Non-navigational Uses of International Watercourses.[999]

(2) Article 15 contains two basic elements, namely, non-discrimination on the basis of nationality or residence and non-discrimination on the basis of where the injury might occur. The rule set forth obliges States to ensure that any person, whatever his nationality or place of residence, who might suffer significant transboundary harm as a result of activities referred to in article 1 should, regardless of where the harm might occur, receive the same treatment as that afforded by the State of origin to its nationals in case of possible domestic harm. It is not intended that this obligation should affect the existing practice in some States of requiring that

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[999] See footnote 919 above.

non-residents or aliens post a bond, as a condition of utilizing the court system, to cover court costs or other fees. Such a practice is not "discriminatory" under the article, and is taken into account by the phrase "in accordance with its legal system".

(3) Article 15 also provides that the State of origin may not discriminate on the basis of the place where the damage might occur. In other words, if significant harm may be caused in State A as a result of an activity referred to in article 1 in State B, State B may not bar an action on the grounds that the harm would occur outside its jurisdiction.

(4) This rule is residual, as indicated by the phrase "unless the States concerned have agreed otherwise". Accordingly, States concerned may agree on the best means of providing protection or redress to persons who may suffer a significant harm, for example through a bilateral agreement. States concerned are encouraged under the present articles to agree on a special regime dealing with activities with the risk of significant transboundary harm. In such arrangements, States may also provide for ways and means of protecting the interests of the persons concerned in case of significant transboundary harm. The phrase "for the protection of the interest of persons" has been used to make it clear that the article is not intended to suggest that States can decide by mutual agreement to discriminate in granting access to their judicial or other procedures or a right to compensation. The purpose of the inter-State agreement should always be the protection of the interests of the victims of the harm.

(5) Precedents for the obligation contained in this article may be found in international agreements and in recommendations of international organizations. For example, the Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden of 19 February 1974 in its article 3 provides as follows:

> "Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court of the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out."

> "The provisions of the first paragraph of this article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured party than the rules of compensation of the State in which the activities are being carried out."[1000]

(6) The Council of the Organization for Economic Cooperation and Development (OECD) has adopted a recommendation on implementation of a regime of equal right of access and non-discrimination in relation to transfrontier pollution. Paragraph 4 (*a*) of that recommendation provides as follows:

> "Countries of origin should ensure that any person who has suffered transfrontier pollution damage or is exposed to a significant risk of transfrontier pollution shall at least receive equivalent treatment to that afforded in the country of origin in cases of domestic pollution and in comparable circumstances, to persons of equivalent condition or status ..."[1001]

Article 16

Emergency preparedness

The State of origin shall develop contingency plans for responding to emergencies, in cooperation, where appropriate, with the State likely to be affected and competent international organizations.

[1000] United Nations, *Treaty Series*, vol. 1092, p. 279, reprinted in ILM, vol. 13 (1974), p. 591. Similar provisions may be found in article 2, paragraph 6, of the ECE Convention on Environmental Impact Assessment in a Transboundary Context (see footnote 908 above); the Guidelines on responsibility and liability regarding transboundary water pollution, part II.E.8, prepared by the ECE Task Force on responsibility and liability regarding transboundary water pollution, document ENVWA/R.45, 20 November 1990; and the Draft ECE Charter on environmental rights and obligations, paragraph 6, prepared at a meeting of experts on environmental law, 25 February-1 March 1991, document ENVWA/R.38, annex I.

[1001] OECD document C (77) 28 (Final), annex, in OECD, *OECD and the Environment* (see footnote 960 above), p. 150. This is also the main thrust of principle 14 of the draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States (see footnote 906 above). A discussion of the principle of equal access may be found in Van Hoogstraten et al., "*L'Egalité d'Access: Pollution Transfrontière*", *Environmental Policy and Law*, vol. 2 (1976), p. 77.

Commentary

(1) This article contains an obligation that calls for anticipatory rather than responsive action. The text of article 16 is based on article 28, paragraph 4 of the Convention on the Law of the Non-navigational Uses of International Watercourses which reads:

> "When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other potentially affected States and competent international organizations."[1002]

The need for the development of contingency plans for responding to possible emergencies is well recognized.[1003] It is suggested that the duty to prevent environmental disasters obligates States to enact safety measures and procedures to minimize the likelihood of major environmental accidents, such as nuclear reactor accidents, toxic chemical spills, oil spills or forest fires. Where necessary, specific safety or contingency measures are open to States to negotiate and agree in matters concerning management of risk of significant transboundary harm, such safety measures could include: (a) adoption of safety standards for the location and operation of industrial and nuclear plants and vehicles; (b) maintenance of equipment and facilities to ensure ongoing compliance with safety measures; (c) monitoring of facilities, vehicles or conditions to detect dangers; and (d) training of workers and monitoring of their performance to ensure compliance with safety standards. Such contingency plans should include establishment of early warning systems.

(2) While States of origin bear the primary responsibility for developing contingency plans, in many cases it will be appropriate to prepare them in cooperation with other States likely to be affected and competent international organizations. For example, the contingency plans may necessitate the involvement of other States likely to be affected, as well as international

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[1002] See footnote 919 above.

[1003] See E. Brown Weiss, "Environmental Disasters in International Law" in *Anuario Jurídico Interamericano*, 1986 (O.A.S., Washington, D.C., 1987), pp. 141-169. The 1983 Resolution of the European Council on Environmental Law concerning "Principles Concerning International Cooperation in Environmental Emergencies Linked to Technological Development" expressly calls for limits on siting of all hazardous installations, for the adoption of safety standards to reduce risk of emergencies, and for monitoring and emergency planning, *Environmental Policy and Law*, vol. 12 (1984), p. 68. See also G. Handl, *Grenzüberschreitendes nukleares Risiko und völkerrechtlicher Schutzanspruch* (see footnote 916 above), pp. 62-65.

organizations with competence in the particular field.[1004] In addition, the coordination of response efforts might be most effectively handled by a competent international organization of which the States concerned are members.

(3) Development of contingency plans are also better achieved through establishment of common or joint commissions composed of members representing all States concerned. National points of contact would also have to be established to review matters and employ the latest means of communication to suit early warnings.[1005] Contingency plans to respond to marine pollution disasters are well known. Article 199 of the United Nations Convention on the Law of the Sea requires States to develop such plans.[1006] The obligation to develop contingency plans is also found in certain bilateral and multilateral agreements concerned with forest fires, nuclear accidents and other environmental catastrophes.[1007] The 1986 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region provides in article 15 that the "Parties shall develop and promote individual contingency plans and joint contingency plans for responding to incidents …"[1008]

Article 17

Notification of an emergency

> The State of origin shall, without delay and by the most expeditious means, at its disposal, notify the State likely to be affected of an emergency concerning an activity within the scope of the present articles and provide it with all relevant and available information.

[1004] For a review of various contingency plans established by several international organizations and bodies such as UNEP, FAO, UN Disaster Relief Coordinator, UNHCR, UNICEF, WHO, IAEA and ICRC, see B.G. Ramcharan, *The International Law and Practice of Early Warning and Preventive Diplomacy: the Emerging Global Watch* (Kluwer 1991), Ch. 7 (The Practice of Early Warning; Environment, Basic Needs and Disaster Preparedness), pp. 143-168.

[1005] For establishment of joint commissions see for example the Indus Waters Treaty, United Nations, *Treaty Series*, vol. 419, p. 125 and the Convention on the Protection of the Rhine against Chemical Pollution, ibid., vol. 1124, p. 375.

[1006] See footnote 913 above.

[1007] For a mention of these agreements see E. Brown Weiss, op. cit. (see footnote 1003 above), p. 148.

[1008] ILM, vol. 26 (1987), p. 38.

Commentary

(1) This article deals with the obligations of States of origin in responding to an actual emergency situation. The provision is based on article 28, paragraph 2 of the 1997 Convention of the Law of the Non-navigational Uses of International Watercourses which reads:

> "A watercourse State shall, without delay and by the most expeditious means available notify other potentially affected States and competent international organizations of any emergency originating within its territory."[1009]

Similar obligations are also contained for example, in Principle 18 of the Rio Declaration on Environment and Development;[1010] the Convention on Early Notification of a Nuclear Accident;[1011] article 198 of the United Nations Convention on the Law of the Sea;[1012] article 3 of the Convention on Biological Diversity;[1013] article 5 (1) (c) of the International Convention on Oil Pollution Preparedness, Response and Cooperation[1014] and a number of other agreements concerning international watercourses.[1015]

[1009] See footnote 919 above.

[1010] See footnote 902 above.

[1011] United Nations, *Treaty Series*, vol. 1439, p. 275, reprinted in ILM, vol. 25 (1986), p. 1370. Article 5 of this Convention provides for detailed data to be notified to the States likely to be affected: (a) the time, exact location where appropriate, and the nature of the nuclear accident; (b) the facility or activity involved; (c) the assumed or established cause and the foreseeable development of the nuclear accident relevant to the transboundary release of the radioactive materials; (d) the general characteristics of the radioactive release, includes, as far as is practicable and appropriate, the nature, probable physical and chemical form and the quantity, composition and effective height of the radioactive release; (e) information on current and forecast meteorological and hydrological conditions, necessary for forecasting the transboundary release of the radioactive materials; (f) the results of environmental monitoring relevant to the transboundary release of the radioactive materials; (g) the off-site protective measures taken or planned; and (h) the predicted behaviour over time of the radioactive release.

[1012] See footnote 913 above.

[1013] Ibid.

[1014] United Nations, *Treaty Series*, vol. 1891, reprinted in ILM, vol. 30 (1990), p. 735.

[1015] See, e.g. article 11 of the Convention on the Protection of the Rhine against Chemical Pollution (footnote 908 above); the Convention Concerning Accidental Pollution of Lake Geneva (1977 Official Collection of Swiss Laws, p. 2204), reproduced in Ruester, Simma and

(2) According to this article, the seriousness of the harm involved together with the suddenness of the emergency's occurrence justifies the measures required. However, suddenness does not denote that the situation needs to be wholly unexpected. Early warning systems established or forecasting of severe weather disturbances could indicate that the emergency is imminent. This may give States concerned some time to react and take reasonable, feasible and practical measures to avoid or at any event mitigate ill-effects of such emergencies. The words "without delay" mean immediately upon learning of the emergency and the phrase "by the most expeditious means at its disposal" indicates that the most rapid means of communication to which a State may have recourse is to be utilized.

(3) Emergencies could result from natural causes or human conduct. Measures to be taken in this regard are without prejudice to any claims of liability whose examination is outside the scope of the present articles.

Article 18

Relationship to other rules of international law

> The present articles are without prejudice to any obligation incurred by States under relevant treaties or rules of customary international law.

Commentary

(1) Article 18 intends to make it clear that the present articles are without prejudice to the existence, operation or effect of any obligation of States under international law relating to an act or omission to which these articles apply. It follows that no inference is to be drawn from the fact that an activity falls within the scope of these articles, as to the existence or non-existence of any other rule of international law as to the activity in question or its actual or potential transboundary effects.

Bock, *International Protection of the Environment*, vol. XXV (1981), p. 285; and the Agreement between Canada and the United States on Great Lakes Water Quality (*Treaties and Other International Acts Series*, No. 9257).

(2) The reference in article 18 to any obligation of States covers both treaty obligations and obligations under customary international law. It is equally intended to extend both to rules having a particular application, whether to a given region or a specified activity, and to rules which are universal or general in scope. This article does not purport to resolve all questions of future conflict of overlap between obligations under treaties and customary international law and obligations under present articles.

Article 19

Settlement of disputes

1. Any dispute concerning the interpretation or application of the present articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties to the dispute, including negotiations, mediation, conciliation, arbitration or judicial settlement.

2. Failing an agreement on the means for the peaceful settlement of the dispute within a period of six months, the parties to the dispute shall, at the request of any of them, have recourse to the establishment of an impartial fact-finding commission.

3. The Fact-finding Commission shall be composed of one member nominated by each party to the dispute and in addition a member not having the nationality of any of the parties to the dispute chosen by the nominated members who shall serve as Chairperson.

4. If more than one State is involved on one side of the dispute and those States do not agree on a common member of the Commission and each of them nominates a member, the other party to the dispute has the right to nominate an equal number of members of the Commission.

5. If the members nominated by the parties to the dispute are unable to agree on a Chairperson within three months of the request for the establishment of the Commission, any party to the dispute may request the Secretary-General of the United Nations to appoint the Chairperson who shall not have the nationality of any of the parties to the dispute. If one of the parties to the dispute fails to nominate a member within three months of the initial request pursuant to paragraph 2, any other party to the dispute may request the Secretary-General of the United Nations to appoint a person who shall not have the nationality of any of the parties to the dispute. The person so appointed shall constitute a single-member Commission.

6. The Commission shall adopt its report by a majority vote, unless it is a single-member Commission, and shall submit that report to the parties to the dispute setting forth its findings and recommendations, which the parties to the dispute shall consider in good faith.

Commentary

(1) Article 19 provides a basic rule for the settlement of disputes arising from the interpretation or application of the regime of prevention set out in the present articles. The rule is residual in nature and applies where the States concerned do not have an applicable agreement for the settlement of such disputes.

(2) It is assumed that the application of this article would come into play only after States concerned have exhausted all the means of persuasion at their disposal through appropriate consultation and negotiations. These could take place as a result of the obligations imposed by the present articles or otherwise in the normal course of inter-State relations.

(3) Failing any agreement through consultation and negotiation, the States concerned are urged to continue to exert efforts to settle their dispute, through other peaceful means of settlement to which they may resort by mutual agreement, including mediation, conciliation, arbitration or judicial settlement. These are means of peaceful settlement of disputes set forth in Article 33 of the Charter of the United Nations, in the second paragraph of the relevant section of the Friendly Relations Declaration[1016] and in paragraph 5 of section I of the Manila Declaration,[1017] which are open to States as free choices to be mutually agreed upon.[1018]

(4) If the States concerned are unable to reach an agreement on any of the means of peaceful settlement of disputes within a period of six months, paragraph 2 of article 19 obliges States, at the request of one of them, to have recourse to the appointment of an impartial fact-finding commission. Paragraphs 3, 4, and 5 of article 19 elaborate the compulsory procedure for the appointment of the fact-finding commission.[1019] This compulsory procedure is useful and

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[1016] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), annex.

[1017] Manila Declaration on the Peaceful Settlement of International Disputes, General Assembly resolution 37/10, annex.

[1018] For an analysis of the various means of peaceful settlement of disputes and references to relevant international instruments, see *Handbook on the Peaceful Settlement of Disputes between States* (United Nations publication, Sales No. E.92.V.7).

[1019] See article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses (footnote 919 above).

necessary to help States to resolve their disputes expeditiously on the basis of an objective identification and evaluation of facts. Lack of proper appreciation of the correct and relevant facts is often at the root of differences or disputes among States.

(5) Resort to impartial fact-finding commissions is a well-known method incorporated in a number of bilateral or multilateral treaties, including the Covenant of the League of Nations, the Charter of the United Nations and the constituent instruments of certain specialized agencies and other international organizations within the United Nations system. Its potential to contribute to the settlement of international disputes is recognized by General Assembly resolution 1967 (XVIII) of 16 December 1963 on the "Question of methods of fact-finding" and the Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security adopted by General Assembly resolution 46/59 (annex) of 9 December 1991.

(6) By virtue of the mandate to investigate the facts and to clarify the questions in dispute, such commissions usually have the competence to arrange for hearings of the parties, the examination of witnesses or on-site visits.

(7) The report of the Commission usually should identify or clarify "facts". Insofar as they involve no assessment or evaluation, they are generally beyond further contention. States concerned are still free to give such weight as they deem appropriate to these "facts" in arriving at a resolution of the dispute. However, article 19 requires States concerned to give the report of the fact-finding commission a good-faith consideration at the least.[1020]

[1020] The criteria of good-faith are described in the commentary to article 9.

CHAPTER VI

RESERVATIONS TO TREATIES

A. Introduction

99. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its agenda the topic "The law and practice relating to reservations to treaties".

100. At its forty-sixth session, in 1994, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic.[1021]

101. At its forty-seventh session, in 1995, the Commission received and discussed the first report of the Special Rapporteur.[1022]

102. Following that discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission's consideration of the topic; they related to the title of the topic, which should now read "Reservations to treaties"; the form of the results of the study, which should be a guide to practice in respect of reservations; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[1023] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. As far as the Guide to Practice is concerned, it would take the form of draft guidelines with commentaries which would be of assistance for the practice of States and international organizations; these guidelines would, if necessary, be accompanied by model clauses.

[1021] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), para. 382.

[1022] A/CN.4/470 and Corr.1.

[1023] *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 491.

103. In 1995, the Commission, in accordance with its earlier practice,[1024] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it to continue its work along the lines indicated in its report and also inviting States to answer the questionnaire.[1025]

104. At its forty-eighth session, the Commission had before it the Special Rapporteur's second report on the topic.[1026] The Special Rapporteur had annexed to his report a draft resolution of the International Law Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[1027] Owing to lack of time, however, the Commission was unable to consider the report and the draft resolution, although some members had expressed their views on the report. Consequently, the Commission decided to defer the debate on the topic until the next year.

105. At its forty-ninth session, the Commission again had before it the second report of the Special Rapporteur on the topic.

106. Following the debate, the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[1028]

[1024] See *Yearbook ... 1993,* vol. II (Part Two), para. 286.

[1025] As of 27 July 2000, 33 States and 24 international organizations had answered the questionnaire.

[1026] A/CN.4/477 and Add.1.

[1027] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 137.

[1028] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), para. 157.

107. In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the International Law Commission of having their views on the preliminary conclusions.

108. At its fiftieth session, the Commission had before it the Special Rapporteur's third report on the topic,[1029] which dealt with the definition of reservations and interpretative declarations to treaties. At the same session, the Commission provisionally adopted six draft guidelines.[1030]

109. At the fifty-first session, the Commission again had before it the part of the Special Rapporteur's third report which it had not had time to consider at its fiftieth session and his fourth report on the topic.[1031] Moreover, the revised bibliography on the topic, the first version of which the Special Rapporteur had submitted in 1996 attached to his second report,[1032] was annexed to the report. The fourth report also dealt with the definition of reservations and interpretative declarations. At the same session, the Commission provisionally adopted 17 draft guidelines.[1033]

110. The Commission also, in the light of the consideration of interpretative declarations, adopted a new version of draft guideline 1.1.1 [1.1.4] and of the draft guideline without a title or number (which has become draft guideline 1.6 (Scope of definitions)).

[1029] A/CN.4/491 and Corr.1 (English only), A/CN.4/491/Add.1, Add.2 and Corr.1, Add.3 and Corr.1 (Chinese, French and Russian only), Add.4 and Corr.1, Add.5 and Add.6 and Corr.1.

[1030] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 540.

[1031] A/CN.4/499.

[1032] A/CN.4/478/Rev.1.

[1033] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), para. 470.

111. At the fifty-second session, the Commission had before it the Special Rapporteur's fifth report on the topic,[1034] dealing, on the one hand, with alternatives to reservations and interpretative declarations and, on the other hand, with procedure regarding reservations and interpretative declarations, particularly their formulation and the question of late reservations and interpretative declarations. At the same session, the Commission provisionally adopted five draft guidelines.[1035] The Commission also deferred consideration of the second part of the fifth report of the Special Rapporteur contained in documents A/CN.4/508/Add.3 and Add.4 to the following session.

B. Consideration of the topic at the present session

1. Second part of the fifth report

112. At the present session, the Commission initially had before it the second part of the fifth report (A/CN.4/508/Add.3 and Add.4) relating to questions of procedure regarding reservations and interpretative declarations. The Commission considered that report at its 2677th, 2678th and 2679th meetings on 18, 22 and 23 May 2001.

113. At its 2679th meeting on 23 May 2001, the Commission decided to refer to the Drafting Committee draft guidelines 2.2.1 ("Reservations formulated when signing and formal confirmation"), 2.2.2 ("Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation"), 2.2.3 ("Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]"), 2.2.4 ("Reservations formulated when signing for which the treaty makes express provision"), 2.3.1 ("Reservations formulated late"), 2.3.2 ("Acceptance of reservations formulated late"), 2.3.3 ("Objection to reservations formulated late"), 2.3.4 ("Late exclusion or modification of the legal effects of a treaty by procedures other than reservations"), 2.4.3 ("Times at which an interpretative declaration may be formulated"), 2.4.4 ("Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation"), 2.4.5 ("Non-confirmation of interpretative declarations formulated when signing [an agreement in simplified form] [a treaty that enters into

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[1034] A/CN.4/508/Add.1 to 4.

[1035] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 663.

force solely by being signed]"), 2.4.6 ("Interpretative declarations formulated when signing for which the treaty makes express provision"), 2.4.7 ("Interpretative declarations formulated late") and 2.4.8 ("Conditional interpretative declarations formulated late").

114. At its 2694th meeting, on 24 July 2001, the Commission considered and provisionally adopted draft guidelines 2.2.1 ("Formal confirmation of reservations formulated when signing a treaty"), 2.2.2 [2.2.3][1036] ("Instances of non-requirement of confirmation of reservations formulated when signing a treaty"), 2.2.3 [2.2.4] ("Reservations formulated upon signature when a treaty expressly so provides"), 2.3.1 ("Late formulation of a reservation"), 2.3.2 ("Acceptance of the late formulation of a reservation"), 2.3.3 ("Objection to the late formulation of a reservation"), 2.3.4 ("Subsequent exclusion or modification of the legal effects of a treaty by means other than reservations"), 2.4.4 [2.4.5] ("Non-requirement of confirmation of interpretative declarations made when signing a treaty"), 2.4.5 [2.4.4] ("Formal confirmation of conditional interpretative declarations formulated when signing a treaty"), 2.4.6 [2.4.7] ("Late formulation of an interpretative declaration"), 2.4.7 [2.4.8] ("Late formulation of a conditional interpretative declaration").

115. The texts of these draft guidelines and of the commentaries thereto are reproduced in section C below.

2. Sixth report

116. The Commission also had before it the sixth report of the Special Rapporteur on the topic (A/CN.4/518 and Add.1-3) relating to the modalities of formulating reservations and interpretative declarations (in particular, their form and notification) and to publicity of reservations and interpretative declarations (their communication, recipients and obligations of the depositary).

117. The Commission considered the report at its 2689th to 2693rd meetings, on 13, 17, 18, 19 and 20 July 2001.

(a) Introduction by the Special Rapporteur of his sixth report

118. The Special Rapporteur first indicated that the part of the report included in document A/CN.4/518 contained the latest information on developments since the fifth report, including those concerning the topic in the Commission on Human Rights and the

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[1036] The numbering in square brackets corresponds to the original numbering of the draft guidelines proposed by the Special Rapporteur.

Sub-Commission on the Promotion and Protection of Human Rights. Addenda 1 and 2 to his report discussed the highly complex problems associated with the formulation of reservations. (Acceptance of reservations and objection would be the subject of his next report.) Addendum 3 contained the consolidated text of all the draft guidelines contained in his fifth and sixth reports, although those in the fifth report had already been referred to the Drafting Committee, since it had not been possible to consider the fifth report in 2000.

119. The Special Rapporteur began by introducing draft guidelines 2.1.1 to 2.1.4, 2.4.1 and 2.4.2 (including two *bis* draft guidelines, 2.1.3 *bis* and 2.4.1 *bis*, and two alternatives for guideline 2.1.3).

120. Draft guideline 2.1.1 (Written form),[1037] on the requirement that reservations have to be in writing, basically reproduces the text of the first sentence of article 23, paragraph 1, of the 1969 and 1986 Vienna Conventions on the Law of Treaties. As the Guide to Practice should be able to stand on its own, the provisions of the Vienna Conventions on reservations should be reproduced word for word therein. The Special Rapporteur recalled that, as the *travaux préparatoires* indicated, there had been practically unanimous agreement that reservations must be in writing. While "oral reservations" were a theoretical possibility, the confirmation at the time of the definitive consent to be bound must undoubtedly be in written form, as stated in guideline 2.1.2 (Form of formal confirmation).[1038]

[1037] The draft guideline reads:

> 2.1.1 *Written form*
>
> A reservation must be formulated in writing.

A/CN.4/518/Add.1, para. 49.

[1038] The draft guideline reads:

> 2.1.2 *Form of formal confirmation*
>
> When formal confirmation of a reservation is necessary, it must be made in writing.

A/CN.4/518/Add.1, para. 49.

121. It remained to be seen whether those rules could be transposed to interpretative declarations. Practice, which is neither readily accessible nor well established, is not very helpful in that respect. But here too a distinction should probably be drawn between "simple" and conditional interpretative declarations, the former category not requiring any particular form (draft guideline 2.4.1: Formulation of interpretative declarations).[1039]

122. On the other hand, in the case of conditional interpretative declarations, the interpretation that the declaring State wishes to set against that of the other parties must be known by those parties if they intend to react to it, exactly as in the case of reservations. It therefore seems logical that the same rule should apply (draft guideline 2.4.2: Formulation of conditional interpretative declarations).[1040]

[1039] The draft guideline reads:

> 2.4.1. *Formulation of interpretative declarations*
>
> An interpretative declaration must be formulated by a person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State or international organization to be bound by a treaty.

A/CN.4/518/Add.1, para. 90.

[1040] The draft guideline reads:

> 2.4.2. Formulation of conditional interpretative declarations
>
> A conditional interpretative declaration must be formulated in writing.
>
> Where necessary, the formal confirmation of a conditional interpretative declaration must be effected in the same manner.
>
> A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty. A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

A/CN.4/518/Add.1, para. 87.

123. In that context, the Special Rapporteur wished to point out that, like other members of the Commission, he had wondered whether it was really necessary to devote specific draft guidelines to conditional interpretative declarations, since the legal rules applying to them appeared to be identical to those on reservations. It seems to him, however, that it would be better to wait until the Commission has considered the effects of reservations and of conditional interpretative declarations before taking a decision on whether or not it is desirable to retain the guidelines concerning the latter category. If it is found that the effects of both are identical, it might be possible to delete all the guidelines relating to conditional interpretative declarations except for a single general guideline stating that the guidelines relating to reservations apply *mutatis mutandis* to conditional interpretative declarations.

124. Concerning draft guideline 2.1.3 (Competence to formulate a reservation at the international level),[1041] the Special Rapporteur recalled that, in 1962, Sir Humphrey Waldock

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[1041] The alternative formulations of the draft guideline reads:

> 2.1.3. Competence to formulate a reservation at the international level
>
> Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of a State or an international organization to be bound by a treaty is competent to formulate a reservation on behalf of such State or international organization.
>
> 2.1.3. Competence to formulate a reservation at the international level
>
> 1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is competent to formulate a reservation on behalf of a State or an international organization if:
>
> (a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or
>
> (b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

suggested specifying the kind of instruments in which reservations should appear and also the persons or organizations competent to make reservations. In his view, Sir Humphrey Waldock's attempted definition was somewhat tautological and repetitive. On the other hand, it seems necessary to specify the authorities competent to make reservations at the international level. For such purposes, the Commission might be guided by the provisions of the Vienna Conventions concerning the authorities or persons considered as representing a State or an international organization for the purpose of expressing consent to be bound by a treaty (art. 7 of the 1969 and 1986 Vienna Conventions). Practice, both that of the Secretary-General of the United Nations and that of other depositaries (the Council of Europe, the Organization of American States), also confirms that it is the rules set forth in those provisions that are followed, *mutatis mutandis*, with regard to competence to make reservations at the international level. The Special Rapporteur wondered whether the rules of article 7 should be made more flexible by adding to the three traditional authorities other categories, such as the permanent representative to an international organization which is a depositary. He finally decided on a hybrid solution, adding the phrase "subject to the customary practices in international organizations which are depositaries of treaties", so as not to challenge existing practices. However, both solutions had their merits and drawbacks and the advice of the Commission on the question would be valuable.

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2. By virtue of their functions and without having to produce full powers, the following are competent to formulate a reservation at the international level on behalf of a State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs;

(b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

(c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

[(d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization.]

A/CN.4/518/Add.1, para. 70.

125. The Special Rapporteur also sought the Commission's advice as to which of the two versions of draft guideline 2.1.3 was preferable: the longer version (reproducing the relevant provisions of the Vienna Convention) or the shorter, more elliptical version.

126. Turning to another issue, the Special Rapporteur discussed the process of formulating reservations (and interpretative declarations) at the internal level. He questioned whether the Guide to Practice should contain guidelines on the wide variety of internal practices or should simply indicate that the whole process was a matter for internal law. Having opted for the latter solution, he had proposed two draft guidelines, 2.1.3 *bis* (Competence to formulate a reservation at the internal level)[1042] and 2.4.1 *bis* (Competence to formulate an interpretative declaration at the internal level),[1043] although he was not sure whether they were entirely necessary. He looked forward to hearing the Commission's view on that point.

[1042] The draft guideline reads:

> 2.1.3 *bis* Competence to formulate a reservation at the internal level
>
> The determination of the competent body and the procedure to be followed for formulating a reservation at the internal level is a matter for the internal law of each State or international organization.

A/CN.4/518/Add.1, para.77.

[1043] The draft guideline reads:

> 2.4.1 *bis* Competence to formulate an interpretative declaration at the internal level
>
> The determination of the competent body and the procedure to be followed for formulating an interpretative declaration at the internal level is a matter for the internal law of each State or international organization.
>
> A State or international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.

A/CN.4/518/Add.1, para. 95.

127. Having examined draft guideline 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations),[1044] the Special Rapporteur wondered whether article 46 of the Vienna Conventions on "defective ratification", which was a pragmatic and balanced provision, should be transposed to reservations and interpretative declarations. He had concluded that that was not necessary either for practical reasons (it would be extremely difficult, if not impossible, to establish a clear-cut violation of internal law in respect of reservations) or for technical reasons (the internal procedure in respect of reservations is often empirical and difficult of access); there, too, the Commission's opinion would be valuable to him. Draft guideline 2.1.4 and the second paragraph of draft guideline 2.4.1 *bis* on interpretative declarations are based on that position.

128. The Special Rapporteur then introduced draft guidelines 2.1.5 to 2.1.8 relating to procedures for the communication and publicity of reservations and 2.4.2 (third paragraph) and 2.4.9 (second paragraph) relating to interpretative declarations.

129. The six draft guidelines were prompted solely by the concern to ensure that the partners of the reserving State or organization were aware of how they could respond, in due course. The relevant provision of the Vienna Conventions - article 23, paragraph 1 - referred to "contracting States or international organizations" or those "entitled to become parties to the treaty". Whereas the first category was well defined, determining the second could prove very delicate in some cases, as the practice of certain depositaries also showed. The Special Rapporteur had not thought it appropriate to be more specific, however, unless the Commission decided otherwise, since the question related to the law of treaties in general and not to the more specialized law of reservations.

[1044] The draft guideline reads:

> 2.1.4 Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations
>
> A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

A/CN.4/518/Add.1, para. 82.

130. Guideline 2.1.5 (Communication of reservations)[1045] is thus based on article 23, paragraph 1, of the 1986 Vienna Convention. It also adds to it, however, by referring to reservations to constituent instruments of international organizations and by largely following current practice. In addition, the expression "deliberative organ" is used to cover the case of hybrid or doubtful international organizations which nonetheless set up such organs. The Commission's opinion on that point and on whether a reservation should be communicated both to the organization itself and to the member States or States entitled to become parties to the constituent instrument would be most useful. Moreover, the Special Rapporteur did not think it appropriate to require reservations to be communicated specifically to the heads of secretariat of international organizations and questioned whether they should be so communicated to preparatory committees established before the entry into force of the constituent instrument of an international organization.

131. The same rules seemed to be transposable to conditional interpretative declarations, as provided for in the third paragraph of draft guideline 2.4.2 (Formulation of conditional interpretative declarations).[1046] By contrast, simple interpretative declarations do not involve any formalities.

[1045] The draft guideline reads:

> 2.1.5 Communication of reservations
>
> A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.
>
> A reservation to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

A/CN.4/518/Add.1, para. 113.

[1046] See footnote 1040 above.

132. The role of the depositary was the focus of draft guidelines 2.1.6 (Procedure for communication of reservations)[1047] and 2.1.7 (Functions of depositaries).[1048] The former relates to the procedure for communicating reservations which have to be confirmed in writing if they are made in a way other than in writing, while the latter concerns the depositary's role with regard to reservations. The Special Rapporteur recalled the development of the depositary's role

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[1047] The draft guideline reads:

> 2.1.6 Procedure for communication of reservations
>
> Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:
>
> (i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to becomes parties to the treaty; or,
>
> (ii) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.
>
> Where a communication relating to a reservation is made by electronic mail, it must be confirmed by regular mail [or by facsimile].

A/CN.4/518/Add.2, para. 153.

[1048] The draft guideline reads:

> 2.1.7 Functions of depositaries
>
> The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.
>
> In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:
>
> (a) The signatory States and organizations and the contracting States and contracting organizations; or
>
> (b) Where appropriate, the competent organ of the international organization concerned.

A/CN.4/518/Add.2, para. 169.

and the largely passive functions accorded to the depositary under the Vienna Conventions. The rules of article 78, paragraph 2 of the 1969 Vienna Convention, which became article 79, paragraph 2, in the 1986 Vienna Convention, are therefore reproduced almost in their entirety. Draft guideline 2.1.8 (Effective date of communications relating to reservations),[1049] meanwhile, relates to the effective date of communications relating to reservations. It would be useful to transpose these rules (2.1.6, 2.1.7 and 2.1.8) to conditional interpretative declarations by the addition of a third paragraph to that effect in draft guideline 2.4.9 (Communication of conditional interpretative declarations),[1050] which deals with the communication of conditional interpretative declarations.

133. In concluding his introduction, the Special Rapporteur expressed the hope that all the draft guidelines would be referred to the Drafting Committee.

[1049] The draft guideline reads:

> 2.1.8 Effective date of communications relating to reservations
>
> A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon its receipt by the State or organization to which it was transmitted.

A/CN.4/518/Add.2, para. 155.

[1050] The draft guideline reads:

> 2.4.9 Communication of conditional interpretative declarations
>
> A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty under the same conditions as a reservation.
>
> A conditional interpretative declaration to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

A/CN.4/518/Add.2, para. 173.

(b) Summary of the debate

134. With regard to draft guidelines 2.1.1, 2.1.2, 2.4.1 and 2.4.2, the members who expressed their views said that they agreed to consider that the written form of reservations and conditional interpretative declarations guaranteed the stability and security of contractual relations.

135. As for draft guideline 2.1.3, several members said that they preferred the longer version for practical reasons to do with facilitating its use and taking account of all the possibilities envisaged by the Vienna Convention, while others would have preferred a more simplified version. According to some members, the reference to heads of permanent missions to an international organization (draft guideline 2.1.3, paragraph 2 (d)) should be deleted.

136. The opinion was expressed that the term "competence" used in the title of draft guideline 2.1.3 could give rise to confusion since the text itself was taken from that of article 7 of the Vienna Convention dealing with "full powers". A distinction should be made between competence to make a reservation (under art. 46 of the Vienna Convention) and its "expression" at the international level. According to one point of view, competence to formulate reservations should belong to the organs empowered to express the consent of the State to be bound by the treaty.

137. As to the question of "deliberative organ" mentioned in draft guideline 2.1.5, certain members found the expression appropriate (particularly in view of disagreements about the capacity or otherwise of certain entities as international organizations), whereas others preferred the terms "treaty organs", "conventional organs", "competent organs" or quite simply "organs".

138. According to one opinion, draft guideline 2.4.1 seemed far too restrictive, since, in practice, a great variety of representatives of States made interpretative declarations. Furthermore, even simple interpretative declarations should be formulated in writing and it was the responsibility of depositaries to transmit them to the States and international organizations concerned in the same way as reservations.

139. According to another opinion, the question of procedures could not easily be dissociated from the questions of validity or permissibility.

140. As for draft guideline 2.1.4, the opinion was expressed that there could be cases where the violation of internal rules on the formulation of reservations could have consequences for the State's consent to be bound. That point deserved to be considered further in comparison with article 46, paragraph 1, of the 1969 Vienna Convention.

141. The question of the communication of reservations and conditional interpretative declarations (draft guidelines 2.1.5 and 2.4.9) involved problems of the definition of States and international organizations entitled to become parties to the treaty. In any case, all those States and organizations had the right to be informed of reservations made by other States. In the view of several members, it would not be appropriate to try to define the term "States or international organizations entitled to become parties to the treaty", a fairly general expression which could also include those which had taken part in the negotiations and which related to the law of treaties as a whole, not to the law of reservations.

142. Some members also shared the Special Rapporteur's opinion that reservations to the constituent instrument of an international organization should also be communicated to the contracting States and organizations. However, they were more hesitant when it came to preparatory committees, which might not have any competence in respect of reservations.

143. It was also emphasized that it is often very difficult to determine whether an international organization has treating-making power, as is shown by the complex example of the European Union.

144. According to several members, communications by electronic mail had to be confirmed by another means, i.e. by post, which is usually in keeping with current depositary practice. According to one opinion, however, the use of electronic mail should be prohibited.

145. Several members expressed doubts about whether draft guidelines 2.1.3 *bis* and 2.1.4 *bis* should be retained. Some questioned, however, whether a link should not be established between internal and international competence.

146. Although draft guideline 2.1.7 presupposed a purely mechanical role on the part of the depositary, there was a case, in the view of certain members, for including the possibility of the depositary rejecting an instrument containing a prohibited reservation under article 19 (a) and (b) of the Vienna Convention. However, it was necessary to be very careful in that regard. In that case and if there was a difference of opinion between the depositary and the reserving State, the provision of article 77, paragraph 2, of the Vienna Convention could be transposed to the draft guideline in question.

147. The question of the communication of simple interpretative declarations was also raised. In fact, if the depositary received such a declaration from the declaring State, it must communicate it to the other States, which could thereby determine its real nature. One member pointed out that the depositary practice of the Organization of American States provided useful information on these two draft guidelines.

148. The view was expressed that draft guideline 2.1.8 ran counter to article 78 (b) of the 1969 Vienna Convention, which states that the date of receipt by the depositary must be accepted. On the other hand, the period during which a State may object to a reservation is determined as from the date of notification of the other States (art. 20, para. 5, of the Vienna Convention).

149. Several members said that they agreed with the Special Rapporteur that the Commission should wait until it had considered the effects of reservations and conditional interpretative declarations before deciding whether specific guidelines on the latter would be necessary. Others strongly emphasized that they were opposed to the draft guidelines dealing separately with conditional interpretative declarations.

150. Summing up the debate, the Special Rapporteur once again underlined the pedagogic and "utilitarian" nature of the Guide to Practice. That was why he had included such draft guidelines as 2.1.1 or 2.1.3 *bis* or 2.4.1 *bis*, which seemed to be self-evident. In the same vein, he preferred to repeat provisions of Vienna Conventions in the draft guidelines rather than refer to them. The transposition must, of course, not be selective, as some members seem to want. Furthermore, the idea that the violation of internal rules for the formulation of reservations could have consequences for the State's (or international organization's) consent to be bound seemed interesting, although he was persuaded that the notion of an evident and formal violation was practically impossible to transpose to the formulation of reservations.

151. He further noted that there was no clear response to the question whether it was necessary to clarify the term "States or international organizations entitled to become parties to the treaty", a question which was all the more complicated in that there were organizations having competence which was exclusive or concurrent with that of member States. It was therefore better not to try to rewrite the entire law of treaties.

152. The Special Rapporteur was also sceptical about the expression proposed for draft guideline 2.1.5, namely, "competent organ", given that it was not easy to define. As to the question whether the depositary must communicate reservations to constituent instruments of international organizations not only to the organization itself, but also to all States concerned, it seemed to him from the debate that the answer should be in the affirmative.

153. He was also in favour of the idea of reflecting the current depositary practice whereby the depositary refused to accept a reservation prohibited by the treaty itself.

154. He was, however, more sceptical about the communication at any time of simple interpretative declarations. With regard to the draft guidelines as a whole, he also reiterated the Commission's position that it would not depart from the letter or spirit of the Vienna Conventions, but would supplement them where necessary.

155. At its 2692nd meeting, held on 19 July 2001, the Commission decided to refer to the Drafting Committee draft guidelines 2.1.1 (Written form), 2.1.2 (Form of formal confirmation), 2.1.3 (Competence to formulate a reservation at the international level), 2.1.3 *bis* (Competence to formulate a reservation at the internal level), 2.1.4 (Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations), 2.1.5 (Communication of reservations), 2.1.6 (Procedure for communication of reservations), 2.1.7 (Functions of depositaries), 2.1.8 (Effective date of communications relating to reservations), 2.4.1 (Formulation of interpretative declarations), 2.4.1 *bis* (Competence to formulate an interpretative declaration at the internal level), 2.4.2 (Formulation of conditional interpretative declarations) and 2.4.9 (Communication of conditional interpretative declarations).

C. Text of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission

1. Text of the draft guidelines

156. The text of the draft guidelines provisionally adopted so far by the Commission is reproduced below.

RESERVATIONS TO TREATIES

Guide to Practice

1. Definitions

1.1 Definition of reservations[1051]

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

1.1.1 [1.1.4] [1052] Object of reservations[1053]

A reservation purports to exclude or modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects in their application to the State or to the international organization which formulates the reservation.

1.1.2 Instances in which reservations may be formulated[1054]

Instances in which a reservation may be formulated under guideline 1.1 include all the means of expressing consent to be bound by a treaty mentioned in article 11 of the Vienna Conventions of 1969 and 1986 on the law of treaties.

1.1.3 [1.1.8] Reservations having territorial scope[1055]

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

[1051] For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 196-199.

[1052] The numbers in square brackets refer to the numbering adopted in the reports of the Special Rapporteur.

[1053] For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 210-217.

[1054] For the commentary to this draft guideline see ibid., *Fifty-third Session*, Supplement No. 10 (A/53/10), pp. 203-206.

[1055] For the commentary to this draft guideline, see ibid., pp. 206-209.

1.1.4 [1.1.3] Reservations formulated when notifying territorial application[1056]

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of a treaty in relation to a territory in respect of which it makes a notification of the territorial application of the treaty constitutes a reservation.

1.1.5 [1.1.6] Statements purporting to limit the obligations of their author[1057]

A unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.

1.1.6 Statements purporting to discharge an obligation by equivalent means[1058]

A unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.

1.1.7 [1.1.1] Reservations formulated jointly[1059]

The joint formulation of a reservation by several States or international organizations does not affect the unilateral nature of that reservation.

1.1.8 Reservations made under exclusionary clauses[1060]

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

[1056] For the commentary to this draft guideline, see ibid., pp. 209-210.

[1057] For the commentary to this draft guideline, see ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 217-221.

[1058] For the commentary to this draft guideline, see ibid., pp. 222-223.

[1059] For the commentary to this draft guideline, see *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 210-213.

[1060] For the commentary to this draft guideline, see ibid., *Fifty-fifth Session, Supplement No. 10*, (A/55/10), pp. 230-241.

1.2 Definition of interpretative declarations[1061]

"Interpretative declaration" means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.

1.2.1 [1.2.4] Conditional interpretative declarations[1062]

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.

1.2.2 [1.2.1] Interpretative declarations formulated jointly[1063]

The joint formulation of an interpretative declaration by several States or international organizations does not affect the unilateral nature of that interpretative declaration.

1.3 Distinction between reservations and interpretative declarations[1064]

The character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce.

1.3.1 Method of implementation of the distinction between reservations and interpretative declarations[1065]

To determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, it is appropriate to interpret the statement in good faith in accordance with the ordinary meaning to be given to its terms, in light of the treaty to which it refers. Due regard shall be given to the intention of the State or the international organization concerned at the time the statement was formulated.

[1061] For the commentary to this draft guideline, see ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 223-240.

[1062] For the commentary to this draft guideline, see ibid., pp. 240-249.

[1063] For the commentary to this draft guideline, see ibid., pp. 249-252.

[1064] For the commentary to this draft guideline, see ibid., pp. 252-253.

[1065] For the commentary to this draft guideline, see ibid., pp. 254-260.

1.3.2 [1.2.2] Phrasing and name[1066]

The phrasing or name given to a unilateral statement provides an indication of the purported legal effect. This is the case in particular when a State or an international organization formulates several unilateral statements in respect of a single treaty and designates some of them as reservations and others as interpretative declarations.

1.3.3 [1.2.3] Formulation of a unilateral statement when a reservation is prohibited[1067]

When a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author.

1.4 Unilateral statements other than reservations and interpretative declarations[1068]

Unilateral statements formulated in relation to a treaty which are not reservations nor interpretative declarations are outside the scope of the present Guide to Practice.

1.4.1 [1.1.5] Statements purporting to undertake unilateral commitments[1069]

A unilateral statement formulated by a State or an international organization in relation to a treaty, whereby its author purports to undertake obligations going beyond those imposed on it by the treaty constitutes a unilateral commitment which is outside the scope of the present Guide to Practice.

[1066] For the commentary to this draft guideline, see ibid., pp. 260-266.

[1067] For the commentary to this draft guideline, see ibid., pp. 266-268.

[1068] For the commentary to this draft guideline, see ibid., pp. 268-270.

[1069] For the commentary to this draft guideline, see ibid., pp. 270-273.

1.4.2 [1.1.6] Unilateral statements purporting to add further elements to a treaty[1070]

A unilateral statement whereby a State or an international organization purports to add further elements to a treaty constitutes a proposal to modify the content of the treaty which is outside the scope of the present Guide to Practice.

1.4.3 [1.1.7] Statements of non-recognition[1071]

A unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which it does not recognize constitutes a statement of non-recognition which is outside the scope of the present Guide to Practice even if it purports to exclude the application of the treaty between the declaring State and the non-recognized entity.

1.4.4 [1.2.5] General statements of policy[1072]

A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice.

1.4.5 [1.2.6] Statements concerning modalities of implementation of a treaty at the internal level[1073]

A unilateral statement formulated by a State or an international organization whereby that State or that organization indicates the manner in which it intends to implement a treaty at the internal level, without purporting as such to affect its rights and obligations towards the other contracting parties, constitutes an informative statement which is outside the scope of the present Guide to Practice.

[1070] For the commentary to this draft guideline, see ibid., pp. 273-274.

[1071] For the commentary to this draft guideline, see ibid., pp. 275-280.

[1072] For the commentary to this draft guideline, see ibid., pp. 280-284.

[1073] For the commentary to this draft guideline, see ibid., pp. 284-289.

1.4.6. [1.4.6, 1.4.7] Unilateral statements made under an optional clause[1074]

A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

1.4.7 [1.4.8] Unilateral statements providing for a choice between the provisions of a treaty[1075]

A unilateral statement made by a State or an international organization, in accordance with a clause in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

1.5 Unilateral statements in respect of bilateral treaties[1076]

1.5.1 [1.1.9] "Reservations" to bilateral treaties[1077]

A unilateral statement, however phrased or named, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty to which it is subjecting the expression of its final consent to be bound, does not constitute a reservation within the meaning of the present Guide to Practice.

1.5.2 [1.2.7] Interpretative declarations in respect of bilateral treaties[1078]

Draft guidelines 1.2 and 1.2.1 are applicable to interpretative declarations in respect of multilateral as well as bilateral treaties.

[1074] For the commentary to this draft guideline, see ibid., *Fifty-fifth Session, Supplement No. 10*, pp. 241-247.

[1075] For the commentary to this draft guideline, see ibid., pp. 247-252.

[1076] For the commentary to this draft guideline, see ibid., *Fifty-fourth Session, Supplement No. 10* (A/54/10), pp. 289-290.

[1077] For the commentary to this draft guideline, see ibid., pp. 290-302.

[1078] For the commentary to this draft guideline, see ibid., pp. 302-306.

1.5.3 [1.2.8] Legal effect of acceptance of an interpretative declaration made in respect of a bilateral treaty by the other party[1079]

The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes the authentic interpretation of that treaty.

1.6 Scope of definitions[1080]

The definitions of unilateral statements included in the present chapter of the Guide to Practice are without prejudice to the permissibility and effects of such statements under the rules applicable to them.

1.7 Alternatives to reservations and interpretative declarations

1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] Alternatives to reservations[1081]

In order to achieve results comparable to those effected by reservations. States or international organizations may also have recourse to alternative procedures, such as:

- The insertion in the treaty of restrictive clauses purporting to limit its scope or application;
- The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

1.7.2 [1.7.5] Alternatives to interpretative declarations[1082]

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

- The insertion in the treaty of provisions purporting to interpret the same treaty;
- The conclusion of a supplementary agreement to the same end.

[1079] For the commentary to this draft guideline, see ibid., pp. 306-307.

[1080] For the commentary to this draft guideline, see ibid., pp. 308-310.

[1081] For the commentary to this draft guideline, see ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 253-269.

[1082] For the commentary to this draft guideline, see ibid., pp. 270-272.

2. Procedure

...[1083]

2.2.1 Formal confirmation of reservations formulated when signing a treaty

If formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

2.2.2 [2.2.3] Instances of non-requirement of confirmation of reservations formulated when signing a treaty

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature the consent to be bound by the treaty.

2.2.3 [2.2.4] Reservations formulated upon signature when a treaty expressly so provides

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

...[1084]

2.3.1 Late formulation of a reservation

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other contracting parties objects to the late formulation of the reservation.

[1083] Section 2.2 as proposed by the Special Rapporteur deals with confirmation of reservations when signing.

[1084] Section 2.3 as proposed by the Special Rapporteur deals with formulation of a reservation.

2.3.2 Acceptance of late formulation of a reservation

Unless the treaty provides otherwise or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a contracting party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

2.3.3 Objection to late formulation of a reservation

If a contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

2.3.4 Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations

A contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

(a) Interpretation of a reservation made earlier; or

(b) A unilateral statement made subsequently under an optional clause.

...[1085]

2.4.3 Time at which an interpretative declaration may be formulated

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7], and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.

2.4.4 [2.4.5] Non-requirement of confirmation of interpretative declarations made when signing a treaty

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

2.4.5 [2.4.4] Formal confirmation of conditional interpretative declarations formulated when signing a treaty

If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case the interpretative declaration shall be considered as having been made on the date of its confirmation.

[1085] Section 2.4 as proposed by the Special Rapporteur deals with procedure regarding interpretative declarations.

2.4.6 [2.4.7] Late formulation of an interpretative declaration

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other contracting Parties objects to the late formulation of the interpretative declaration.

2.4.7 [2.4.8] Late formulation of a conditional interpretative declaration

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other contracting Parties objects to the late formulation of the conditional interpretative declaration.

2. Texts of the draft guidelines with commentaries thereto adopted at the fifty-third session of the Commission

157. Text of the draft guidelines with commentaries thereto adopted by the Commission at the fifty-third session are reproduced below:

2.2 Confirmation of reservations when signing

Draft guidelines 2.2.1, 2.2.2 and 2.2.3 relate to the confirmation of reservations formulated when signing a treaty. Although this rule is provided for by article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions, it is not absolute. It would obviously be meaningless if a treaty entered into force merely as a result of its signature, as made clear in draft guideline 2.2.2. Requiring respect for it when the treaty itself contains a provision dealing expressly with the possibility of reservations when signing would, moreover, deprive this reservation clause of any useful purpose (see draft guideline 2.2.3).

2.2.1 Formal confirmation of reservations formulated when signing a treaty

If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation.

Commentary

(1) Draft guideline 2.2.1 reproduces the exact wording of the text of article 23, paragraph 2, of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. As the Commission indicated in the commentary to draft guideline 1.1,[1086] it is consistent with the aim of the Guide to Practice to bring together in a single document all of the recommended rules and practices in respect of reservations.

(2) The text of article 23, paragraph 2, of the 1986 Convention is identical to the corresponding provision of the 1969 Convention, except that it refers to the procedure to be followed when an international organization is a party to a treaty. Because it is more complete, the 1986 wording was preferred to the 1969 wording.

(3) This provision originated in the proposal made by Sir Humphrey Waldock in his first report on the law of treaties for the inclusion of a provision (draft article 17, para. 3 (b)) based on the principle that "the reservation will be presumed to have lapsed unless some indication is given in the instrument of ratification that it is maintained".[1087] The Special Rapporteur did not conceal that "[c] clearly, different opinions may be held as to what exactly is the existing rule on the point, if indeed any rule exists at all"[1088] and mentioned, in particular, article 14 (d)[1089] of the Harvard draft, which posited the contrary assumption.[1090]

[1086] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), p. 196, para. (2) of the commentary.

[1087] *Yearbook ... 1962*, vol. II, p. 66.

[1088] Ibid.

[1089] Waldock was citing article 15 (d) by mistake.

[1090] "If a State has made a reservation when signing a treaty, its later ratification will give effect to the treaty in the relations of that State with other States which have become or may become parties to the treaty"; the Harvard draft is reproduced in *Yearbook ... 1950*, vol. II, pp. 243-244.

(4) The principle of the obligation to confirm a reservation formulated when signing was stated in article 18, paragraph 2, of the Commission's draft articles on the law of treaties, which were adopted without much discussion in 1962[1091] and which related generally to reservations formulated before the adoption of the text.

(5) The 1962 commentary gives a concise explanation of the *raison d'être* of the rule adopted by the Commission:

> "A statement of reservation is sometimes made during the negotiation and duly recorded in the *procès-verbaux*. Such embryo reservations have sometimes been relied upon afterwards as amounting to formal reservations. It seems essential, however, that the State concerned should formally reiterate the statement in some manner in order that its intention actually to formulate a reservation should be clear."[1092]

(6) On second reading, the wording of the draft provisions on the procedure in respect of reservations was considerably simplified at the urging of some Governments, which considered that many of them "would fit better into a code of recommended practices".[1093] The new provision, which was adopted on the basis of the proposals by the Special Rapporteur, Sir Humphrey Waldock,[1094] differs from the current text of article 23, paragraph 2, only by the inclusion of a reference to reservations formulated "on the occasion of the adoption of the text",[1095] which was deleted at the Vienna Conference under circumstances that have been described as "mysterious".[1096] The commentary to this provision reproduces the 1962 text[1097] almost verbatim and adds:

[1091] See the summary records of the 651st-656th meetings (25 May-4 June 1962), *Yearbook ... 1962*, vol. I, pp. 139-179.

[1092] *Yearbook ... 1962*, vol. II, p. 180.

[1093] Comments by Sweden, ibid., vol. II, p. 47.

[1094] Ibid., pp. 53-54.

[1095] "If formulated on the occasion of the adoption of the text or upon signing the treaty ..." (*Yearbook ... 1966*, vol. II, p. 208).

[1096] "In paragraph 2, the phrase 'on the occasion of the adoption of the text' mysteriously disappeared from the Commission's text when it was finally approved by the Conference" (J.M. Ruda, "Reservations to Treaties", *RCADI* 1975-III, vol. 146, p. 195).

[1097] See para. (5) of the commentary to this guideline.

> "Paragraph 2 concerns reservations made at a later stage [after negotiation]: on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval. Here again the Commission considered it essential that, when definitely committing itself to be bound, the State should leave no doubt as to its final standpoint in regard to the reservation. The paragraph accordingly requires the State formally to confirm the reservation if it desires to maintain it. At the same time, it provides that in these cases the reservation shall be considered as having been made on the date of its confirmation, a point which is of importance for the operation of paragraph 5 of article 17 [20 in the text of the Convention]."[1098]

(7) The rule in article 23, paragraph 2, of the 1969 Convention was reproduced in the 1986 Convention with only the drafting changes made necessary by the inclusion of international organizations[1099] and the introduction of the concept of "formal confirmation" (with the risks of confusion which this implies between that concept and the concept of the formal confirmation of the reservation in article 23).[1100] The 1986 Vienna Conference adopted the ILC text[1101] without changing the French text.[1102]

(8) While there can be hardly any doubt that, at the time of its adoption, article 23, paragraph 2, of the 1969 Convention related more to progressive development than to codification in the strict sense,[1103] it may be considered that the obligation formally to confirm

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[1098] *Yearbook ... 1966*, vol. II, p. 208. Article 20 of the Vienna Convention relates to acceptance of and objection to reservations.

[1099] See the fourth and fifth reports of Paul Reuter, *Yearbook ... 1975*, vol. II, p. 38, and *Yearbook ... 1976*, vol. II, Part One, p. 146.

[1100] See the discussions on this subject at the 1434th meeting on 6 June 1977, *Yearbook ... 1977*, vol. I, pp. 101-103. The Commission is aware of these risks, but did not believe that it should amend terminology that is now widely accepted.

[1101] *Yearbook ... 1982*, vol. II, Part Two, p. 37.

[1102] The Chairman of the Drafting Committee, Mr. Al-Khasawneh, stated that a correction had been made to the English text (replacing "by a treaty" with "by the treaty" - fifth plenary meeting, 18 March 1986, records of the Conference, p. 15, para. 63).

[1103] See the first report of Sir Humphrey Waldock, footnote 1087 above, para. 236. See also: D.W. Greig, "Reservations: Equity as a Balancing Factor?", *Australian Yearbook of* reservations formulated when treaties in solemn form are signed has become part of positive law. Crystallized by the 1969 Convention and confirmed in 1986, the rule is followed in practice (but not systematically)[1104] and seems to satisfy an *opinio necessitatis juris*, which allows a customary value to be assigned to it.[1105]

(9) In legal writings, the rule laid down in article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions now appears to have met with general approval,[1106] even if that was not always true in the past.[1107] In any case, whatever arguments might be advanced against it, they

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International Law, 1995, p. 28, or Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988, p. 41.

[1104] Thus, the practice of the Secretary-General of the United Nations does not draw all the necessary inferences from the 1976 note by the Legal Counsel (see footnote 1105 below), since the former includes in the valuable publication entitled *Multilateral treaties deposited with the Secretary-General* reservations formulated when the treaty was signed, whether or not they were confirmed subsequently, even on the assumption that the State formulated other reservations when expressing its definitive consent to be bound; see, for example, United Nations, *Multilateral treaties deposited with the Secretary-General*: *Status as at 31 December 1999*, vol. I, p. 487, reservations by Turkey to the Customs Convention on Containers of 2 December 1972, and pp. 334-346: reservations by Iran and Peru to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988; such practice probably reflects a purely mechanical approach to the role of the depositary and does not involve any value judgement about the validity or nature of the declarations in question.

[1105] See, for example, the aide-memoire of the United Nations Legal Counsel describing the "practice of the Secretary-General in his capacity as depositary of multilateral treaties regarding … reservations and objections to reservations relating to treaties not containing provisions in that respect", which relied on article 23, paragraph 2, of the 1969 Vienna Convention in concluding that: "If formulated at the time of signature subject to ratification, the reservation has only a declaratory effect, having the same legal value as the signature itself. It must be confirmed at the time of ratification; otherwise, it is deemed to have been withdrawn" (*United Nations Juridical Yearbook*, 1976, p. 219); the Council of Europe changed its practice in this regard in 1980 (cf. Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, loc. cit., and Jörg Polakiewicz, *Treaty-Making in the Council of Europe*, Publications du Conseil de l'Europe, 1999, p. 96) and, in their answers to the Commission's questionnaire on reservations to treaties, the States which indicated that they usually confirmed reservations formulated when the treaty was signed at the time of ratification or accession.

[1106] See, in particular, D.W. Greig, "Reservations: Equity as a Balancing Factor?", *AYIL*, 1995, p. 28, and P.H. Imbert, *Les réserves au traités multilatéraux*, Paris, Pedone, 1979, p. 285.

[1107] See Imbert, ibid., pp. 253-254.

would not be of such a nature as to call into question the clear-cut rule which is contained in the Vienna Conventions and which the Commission has decided to follow in principle, except in the event of an overwhelming objection.

(10) Although the principle embodied in that provision met with general approval, the Commission asked three questions about:

The effect of State succession on the implementation of that principle;

The incomplete list of cases in which a reservation when signing must be confirmed; and, above all,

Whether reference should be made to the "embryo reservations"[1108] constituted by some statements made before the signing of the text of the treaty.

(11) It was, for example, asked whether the wording of article 23, paragraph 2, should not be supplemented to take account of the possibility afforded to a successor State to formulate a reservation when it makes a notification of succession in accordance with draft guideline 1.1,[1109] which thus rounds out the definition of reservations contained in article 2, paragraph 1 (d), of the 1986 Convention. In the Commission's opinion, the answer is not very simple. At first glance, the successor State can either confirm or invalidate an existing reservation made by the predecessor State[1110] or formulate a new reservation when it makes a notification of succession;[1111] in neither of these two cases is the successor State thus led to confirm a reservation when signing. Nevertheless, under article 18, paragraphs 1 and 2, of the 1978 Convention, a newly independent State may, under certain conditions, establish, through a notification of succession, its capacity as a contracting State or party to a multilateral treaty which was not in force on the date of the State's succession and to which the predecessor State was itself a contracting State. Under article 2 (f) of the 1969 Vienna Convention and article 2 (k) of the 1986 Convention, however, "'contracting State' means a State which has consented to be

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[1108] See para (5) of the commentary to this draft guideline.

[1109] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), p. 196.

[1110] Cf. article 20, para. 1, of the 1978 Vienna Convention on Succession of States in Respect of Treaties.

[1111] Cf. article 20, para. 2.

bound by the treaty, whether or not the treaty has entered into force" - and not merely a signature. It follows, conversely, that there can be no "succession to the signing" of a treaty (subject to ratification or an equivalent procedure[1112])[1113] and that the concept of notification of succession should not be introduced into draft guideline 2.1.1.[1114]

(12) The Commission also questioned whether it should take account, in the preparation of this draft, of draft guideline 1.1.2 ("Cases in which a reservation may be formulated").[1115] The problem does not arise with regard to the designation of the moment when the confirmation should take place, since the formula contained in article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions is equivalent to the one adopted by the Commission in draft guideline 1.1.2 ("when expressing its consent to be bound"). It might be thought, however, that the number of cases to which article 23, paragraph 2, seems to limit the possibility of subordinating definitive consent to be bound (ratification, act of formal confirmation, acceptance or approval) is too small and does not correspond to the one in article 11.

[1112] See draft guideline 2.2.2.

[1113] The publication *Multilateral treaties deposited with the Secretary-General - Status as at 31 December 1999* does, however, mention, in the footnotes and without special comment, reservations formulated when signing by a predecessor State and apparently not formally confirmed by the successor State or States; see, for example, Czechoslovakia's reservations to the 1982 United Nations Convention on the Law of the Sea, noted in connection with the Czech Republic and Slovakia (vol. II, ST/LEG/SER.E/18 (vol. II), Sales No. E.OO.V.2, pp. 239-240, note 4).

[1114] According to Claude Pilloud, "it seems that it should be recognized that, in applying the rule provided for in article 23, paragraph 2, by analogy to reservations expressed when signing, States which have made a declaration of continuity" to the Geneva Conventions of 1949 "should, if they had meant to endorse the reservations expressed [by the predecessor State], so state expressly in their declaration of continuity" ("Les réserves aux Conventions de Genève de 1949", *Revue internationale de la Croix-Rouge*, March-April 1976, p. 135). It is doubtful whether such an analogy can be made: the matter will be considered by the Commission when it carries out a more systematic study of the problems relating to succession to reservations.

[1115] "The cases in which a reservation may be formulated contained in guideline 1.1 include all the means of expressing consent to be bound by a treaty referred to in article 11 of the 1969 and 1986 Vienna Conventions on the Law of Treaties", see *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), p. 203.

(13) However, although some of its members did not so agree, the Commission considered that such a concern is excessive; the differences in wording between article 11 and article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions lie in the omission from the latter of these provisions of two possibilities contemplated in the former: "exchange of instruments constituting a treaty" and "any other means if so agreed".[1116] The probability that a State or an international organization would subordinate the expression of its definitive consent to be bound by a multilateral treaty subject to reservations to one of these modalities is sufficiently low that it does not seem useful to overburden the wording of draft guideline 2.2.1 or to include a draft guideline equivalent to draft guideline 1.1.2 in chapter 2 of the Guide to Practice.

(14) Thirdly, several members of the Commission considered that account should be taken of the possible case where a reservation is formulated not at the time of signing the treaty, but before that. In their opinion, nothing prevents a State or an international organization from indicating formally to its partners the "reservations" which it has regarding the adopted text at the authentication stage[1117] or, for that matter, at any previous stage of negotiations.[1118]

(15) The Commission had, moreover, considered that possibility in draft article 19 (which became article 23 of the 1969 Convention), of which paragraph 2, as contained in the final text of the draft articles adopted in 1966, provided that: "If formulated on the occasion of the adoption of the text … a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation".[1119] Commenting on this

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[1116] For a similar comment concerning the comparison of article 2, para. 1 (d), and article 11, see the commentary to draft guideline 1.1.2, in *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), pp. 205-206, para. (8).

[1117] In addition to signing, moreover, article 10 of the 1969 and 1986 Vienna Conventions mentions initialling and signing *ad referendum* as methods of authenticating the text of a treaty. On authentication "as a distinct part of the treaty-making process", see the commentary to article 9 of the Commission's draft articles on the law of treaties (which became article 10 at the Vienna Conference), *Yearbook ... 1966*, vol. II, p. 212.

[1118] See, in this connection, Japan's reservation to article 2 of the Food Aid Convention of 14 April 1971, which was negotiated by that State during the negotiation of the text, announced at the time of signing and formulated at the time of the deposit of the instrument of ratification with the depositary, the Government of the United States, on 12 May 1972.

[1119] See *Yearbook ... 1966*, vol. II, p. 208.

provision, the Commission stated that "statements of reservations are made in practice at various stages in the conclusion of the treaty" and explained the reasons why it considered it necessary to confirm reservations on signing when expressing consent to be bound,[1120] adding that:

> "Accordingly, a statement during the negotiations expressing a reservation is not, as such, recognized in article 16 [now article 19] as a method of formulating a reservation and equally receives no mention in the present article."[1121]

(16) As indicated above,[1122] the reference to the adoption of the text disappeared from the text of article 23, paragraph 2, of the 1969 Vienna Convention in "mysterious" circumstances during the 1968-1969 Vienna Conference, probably out of concern for consistency with the wording of the *chapeau* of article 19.

(17) However, a majority of members objected to the adoption of a draft guideline along those lines for fear of encouraging a growing number of statements which were intended to limit the scope of the text of the treaty, were formulated before the adoption of its text and were thus not in keeping with the definition of reservations.

2.2.2 [2.2.3] Instances of non-requirement of confirmation of reservations formulated when signing a treaty

A reservation formulated when signing a treaty does not require subsequent confirmation when a State or an international organization expresses by its signature its consent to be bound by the treaty.

Commentary

(1) The solution which was adopted for draft guideline 2.2.1 and which is faithful to the Vienna text obviously implies that the rule thus codified applies only to treaties in formal form, those that do not enter into force solely by being signed.[1123] With regard to treaties not requiring any post-signing formalities in order to enter into force and which are referred to as

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[1120] See para. (5) of the commentary to this draft guideline.

[1121] *Yearbook ... 1996*, vol. II, p. 208, para. (3) of the commentary.

[1122] See para. (6) of the commentary to this draft guideline.

[1123] On the distinction between treaties in formal form and agreements in simplified form, see, in particular: C. Chayet, "Les accords en forme simplifée", *AFDI* 1957, pp. 1-13; P. Daillier and A. Pellet, *Droit international public (Nguyen Quoc Dinh)*, Paris, *LGDJ*, 6th ed., 1999, pp. 136-144; P.F. Smets, *La conclusion des accords en forme simplifée*, Brussels, Bruylant, 1969, pp. 284.

"agreements in simplified form",[1124] however, it is self-evident that, if formulated when the treaty is signed, a reservation becomes effective immediately without any formal confirmation being necessary or even conceivable.

(2) The Commission is not aware, however, of any clear-cut example of a reservation made at the time when a multilateral agreement in simplified form was signed. This eventuality certainly cannot be ruled out, however, if only because there are "mixed treaties", which can, if the parties so choose, enter into force solely upon signature or following ratification and which are subject to reservations or contain reservation clauses.[1125]

(3) In fact, this rule derives, *a contrario*, from the text of article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions reproduced in draft guideline 2.2.1. In view of the practical nature of the Guide to Practice, however, the Commission found that it would not be superfluous to clarify this expressly in draft guideline 2.2.2.

(4) Although some members of the Commission would have preferred the term "agreements in simplified form", which is commonly used in French writings, it seemed preferable not to use this term which was not used in the 1969 Vienna Convention.

(5) It may also be asked whether a reservation to a treaty provisionally entering into force or provisionally implemented pending its ratification[1126] - and hypothetically formulated when signing - must be confirmed at the time of its author's expression of definitive consent to be

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[1124] While the procedure involving agreements in simplified form is more commonly used for concluding bilateral rather than multilateral treaties, it is not at all unknown in the second case and major multilateral agreements may be cited which have entered into force solely by being signed. This is true, for example, of the 1947 General Agreement on Tariffs and Trade (at least in terms of the entry into force of the bulk of its provisions following the signing of the Protocol of Provisional Application), the Geneva Declaration on the Neutrality of Laos of 23 July 1962 and the Agreement establishing a Food and Fertilizer Technology Centre for the Asian and Pacific Region of 11 June 1969.

[1125] Cf. article XIX of the Agreement of 20 August 1971 concerning the International Telecommunications Satellite Organization (Intelsat); see also the 1971 Convention on Psychotropic Substances (art. 32), the Code of Conduct for Liner Conferences of 6 April 1974 and the 1999 International Convention on Arrest of Ships (art. 12, para. 2).

[1126] Cf. articles 24 and 25 of the 1969 and 1986 Vienna Conventions.

bound by the treaty. The Commission took the view that that was a different case than the one covered by draft guideline 2.2.2 and that there was no reason for a solution departing from the principle laid down in draft guideline 2.2.1. Accordingly, a separate draft guideline does not appear to be necessary.

2.2.3 [2.2.4] Reservations formulated upon signature when a treaty expressly so provides

A reservation formulated when signing a treaty, where the treaty expressly provides that a State or an international organization may make such a reservation at that time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

Commentary

(1) Alongside the case provided for by draft guideline 1.2.1, there is another hypothetical case in which the confirmation of a reservation formulated when signing appears to be superfluous, namely, where the treaty itself provides expressly for such a possibility without requiring confirmation. For example, article 8, paragraph 1, of the 1963 Council of Europe Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality provides that:

> "Any Contracting Party may, when *signing this Convention* or depositing its instrument of ratification, acceptance or accession, declare that it avails itself of one or more of the reservations provided for in the Annex to the present Convention."[1127]

(2) In a case of this kind, it seems that practice consists of not requiring a party which formulates a reservation when signing to confirm it when expressing definitive consent to be bound. Thus, France made a reservation when it signed the 1963 Convention and did not subsequently confirm it.[1128] Similarly, Hungary and Poland did not confirm their reservation to

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[1127] Italics added. See also, among many examples, article 17 of the 1961 New York Convention on the Reduction of Statelessness, United Nations, *Treaty Series* vol. 989, p. 175, article 30 of the 1988 Council of Europe Convention on Mutual Administrative Assistance on Tax Matters (ETS, No. 127), article 29 of the 1997 European Convention on Nationality (ETS, No. 166) and article 24 of the 1989 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons (Hague Conf. on Private International Law, Proceedings of the Sixteenth Session, Tome II, 1990, P. 526).

[1128] Council of Europe, European Committee on Legal Cooperation (CCJ), CCJ Conventions and reservations to those Conventions, Note by the Secretariat, CCJ (99) 36, Strasbourg, 30 March 1999, p. 11; the same applied to Belgium's reservations to the 1988 Convention on Mutual Administrative Assistance on Tax Matters (ibid., p. 55).

article 20 of the 1984 Convention against Torture, article 28, paragraph 1, of which provides that such a reservation may be made when signing. Luxembourg also did not confirm the reservation it made to the Convention relating to the Status of Refugees of 28 July 1951 and Ecuador did not confirm its reservation to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, of 17 December 1973.[1129] It is true that other States[1130] nonetheless confirmed their reservation at the time of ratification.

(3) The members of the Commission had different opinions about this uncertain practice, although all agreed that a position should be adopted on this point in the Guide to Practice.

(4) Some members took the view that, in cases of this kind, the general rule laid down in article 23, paragraph 2, of the Vienna Conventions should not be excluded because the reservation clauses in question, which mechanically reproduce the provisions of article 11, would then not actually have any particular scope.

(5) In the opinion of the majority of the members of the Commission, however, the rule embodied in article 23, paragraph 2, of the Vienna Conventions, which, like all their provisions, was only dispositive in nature, should be applicable only where a treaty was silent; otherwise, the provisions relating to the possibility of reservations when signing would serve no useful purpose. In their view, the uncertainties of practice may be explained by the fact that, if a formal confirmation in a case of this kind is not essential, it is also not ruled out: reservations made when signing a convention expressly authorizing reservations on signing are sufficient in and of themselves, it being understood, however, that nothing prevents reserving States from confirming them,[1131] even though nothing compels them to do so.

[1129] *Multilateral treaties deposited with the Secretary-General* ..., vol. I, p. 224 and p. 214; ibid., vol. I, p. 265; and vol. II, p. 115. The Hungarian reservation was subsequently withdrawn.

[1130] Belarus, Bulgaria (reservation subsequently withdrawn), Czechoslovakia (reservation subsequently withdrawn by the Czech Republic and Slovakia), Morocco, Tunisia and Ukraine (reservation subsequently withdrawn); see ibid., pp. 212-214.

[1131] And such "precautionary confirmations" are quite common (see, for example, the reservations by Belarus, Brazil (which nevertheless confirmed only two of its three initial reservations), Hungary, Poland, Turkey and Ukraine to the 1971 Convention on Psychotropic Substances, ibid., vol. I, pp. 327-329).

(6) Accordingly, the Commission endorsed the "minimum" practice, something that seems logical, since the treaty expressly provides for reservations when signing. According to the majority opinion, if this principle was not recognized, many unconfirmed reservations formulated when signing would have to be deemed without effect, even where the States which formulated them did so on the basis of the text of the treaty itself.

2.3 Late formulation of a reservation

(1) Chapter 2, section 3, of the Guide to Practice is devoted to the particularly sensitive issue of what are commonly called "late reservations". The Commission has preferred to speak of the "late formulation of a reservation", however, in order clearly to indicate that what is meant is not a new or separate category of reservations, but, rather, declarations which are presented as reservations, but which are not in keeping with the time periods during which they may, in principle, be considered as such, since the moments at which reservations may be formulated are specified in the definition of reservations itself.[1132]

(2) In practice, however, it is not uncommon for a State[1133] to try to formulate a reservation at a different moment from those provided for by the Vienna definition and this possibility, which may have some definite advantages, has not been totally ruled out by practice.

(3) After the expression of its consent to be bound, a State cannot, by means of the interpretation of a reservation shirk certain obligations established by a treaty. This principle is not to be sanctioned lightly and that the primary objective of this section of the Guide to Practice is to indicate the rigorous conditions to which it is subject. Draft guideline 2.3.1 states the rule that the late formulation of a reservation is, in principle, excluded and the draft guidelines that follow it stipulate the basic conditions to which any exception to this principle is subject: the

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[1132] Cf. articles 2, paragraph 1 (d), of the 1969 and 1986 Vienna Conventions on the Law of Treaties, article 2, paragraph 1 (j), of the 1978 Vienna Convention on Succession of States in respect of Treaties and draft guideline 1.1 (*Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), p. 196): "'Reservation' means a unilateral statement [...] made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty [...]"; see also draft guideline 1.1.2, ibid., p. 203.

[1133] To the Commission's knowledge, there has to date been no example of the late formulation of a reservation by an international organization.

absence of objections within a 12-month period by all the other parties without exception (draft guidelines 2.3.1, 2.3.2 and 2.3.3). In addition, draft guideline 2.3.4 is designed to prevent the exclusion of the principle of the late formulation of reservations from being circumvented by means other than reservations.

2.3.1 Late formulation of a reservation

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty except if none of the other contracting Parties objects to the late formulation of the reservation.

Commentary

(1) Unless otherwise provided by a treaty, something which is always possible,[1134] the expression of definitive consent be bound constitutes, for the contracting parties, the last (and in view of the requirement concerning formal confirmation of reservations formulated during negotiations and when signing, only) time when a reservation may be formulated. This rule, which is unanimously recognized in legal writings[1135] and which arose from the very definition of reservations[1136] and is also implied by the "chapeau" of article 19 of the 1969

[1134] Some reservation clauses specify, for example, that "reservations to one or more of the provisions of this Convention may be made at any time prior to ratification of or accession to this Convention ..." (Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy) or "at the latest at the moment of ratification or at adhesion, each State may make the reserves contemplated in articles ..." (Hague Convention of 5 October 1961 concerning the protection of infants; these examples are quoted by P. H. Imbert, *Les réserves aux traités multilatéraux*, Paris, Pedone, 1979, pp. 163-164); see also the examples given in para. (3) of this commentary.

[1135] It has been stated particularly forcefully by Giorgio Gaja: "the latest moment in which a State may make a reservation is when it expresses its consent to be bound by a treaty" ("Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification - Études en l'honneur de Roberto Ago*, Milan, Giuffrè, 1987, vol. I, p. 310).

[1136] See footnote 1132, above.

and 1986 Vienna Conventions,[1137] is widely observed in practice.[1138] It was regarded as forming part of positive law by the International Court of Justice in its Judgment of 20 December 1988 in the *Border and Transborder Armed Actions* case:

> "... Article LV of the Pact of Bogotá enables the parties to make reservations to that instrument which 'shall, with respect to the State that makes them, apply to all signatory States on the basis of reciprocity'. In the absence of special procedural provisions, those reservations may, in accordance with the rules of general international law on the point as codified by the 1969 Vienna Convention on the Law of Treaties, be made only at the time of signature or ratification of the pact or at the time of adhesion to that instrument."[1139]

(2) According to some members of the Commission it was questionable whether this kind of declaration was compatible with the definition of reservation under draft guideline 1.1. Nevertheless, the principle that a reservation may not be formulated after expression of consent to be bound "is not absolute. It applies only if the contracting States do not authorize by agreement the formulation, in one form or another, of new reservations"[1140] or restrict still further the moments at which a reservation is possible.

[1137] "A State [or an international organization] may, when signing, ratifying, [formally confirming], accepting, approving or acceding to a treaty, formulate a reservation ...".

[1138] Moreover, this explains why States sometimes try to get round the prohibition on formulating reservations after the entry into force of a treaty by calling unilateral statements "interpretative declarations", which actually match the definition of reservations (see para. (27) of the commentary to draft guideline 1.2 ("Definition of interpretative declarations"), *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), p. 236).

[1139] *I.C.J. Reports 1988*, p.85.

[1140] Jean-François Flauss, "Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: Requiem pour la déclaration interprétative relative à l'article 6, paragraphe 1", *R.U.D.H.* 1993, p. 302.

(3) Although the possibility of late formulation of a reservation "has never been contemplated, either in the context of the International Law Commission or during the Vienna Conference",[1141] it is relatively frequent.[1142] Thus, for example:

Article 29 of the Convention of 23 July 1912 on the Unification of the Law relating to Bills of Exchange provided that:

> "The State which desires to avail itself of the reservations in Article 1, paragraph 2, or in Article 22, paragraph 1, must specify the reservation in its instrument of ratification or adhesion ...
>
> "The contracting State which *hereafter* desires to avail itself of the reservations[1143] above mentioned, must notify its intention in writing to the Government of the Netherlands…";[1144]

Likewise, under article XXVI of the 1955 Hague Protocol to amend the Convention for the Unification of certain rules relating to international carriage by air signed at Warsaw on 12 October 1929:[1145]

> "No reservation may be made to this Protocol except that a State may *at any time* declare by a notification addressed to the Government of the People's Republic of Poland that the Convention as amended by this Protocol shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities";

[1141] P. H. Imbert, *Les réserves aux traités multilatéraux*, Paris, Pedone, 1979, p. 12, note 14.

[1142] In addition, see also those examples given by P.H. Imbert in *Les réserves aux traités multilatéraux*, Paris, Pedone, 1979, pp. 164-165.

[12] In fact, what is meant here is not *reservations*, but *reservation clauses*.

[1144] See also article 1, paragraphs 3 and 4, of the Convention of 7 June 1930 Providing a Uniform Law for Bills of Exchange and Promissory Notes and article 1, paragraphs 3 and 4, of the Convention of 19 March 1931 providing a Uniform Law for Cheques: "... the reservations referred to in Articles ... may, however, be made after ratification or accession, provided that they are notified to the Secretary-General of the League of Nations ..."; "Each of the High Contracting Parties may, in urgent cases, make use of the reservations contained in Articles ... even after ratification or accession ...".

[1145] United Nations, *Treaty Series*, vol. 478, p. 389.

Article 38 of the Hague Convention of 2 October 1973 concerning the International Administration of the Estates of Deceased Persons provides that:

> "A Contracting State desiring to exercise one or more of the options envisaged in Article 4, the second paragraph of Article 6, the second and third paragraphs of Article 30 and Article 31, shall notify this to the Ministry of Foreign Affairs of the Netherlands, either at the time of the deposit of its instrument of ratification, acceptance, approval or accession *or subsequently*";[1146]

Under article 30, paragraph 3, of the Convention of 25 January 1988 on Mutual Administrative Assistance on Tax Matters (Council of Europe):

> "After the entry into force of the Convention in respect of a Party, that Party may make one or more of the reservations listed in paragraph 1 which it did not make at the time of ratification, acceptance or approval. Such reservations shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of the reservation by one of the Depositaries";[1147]

Similarly, article 10, paragraph 1, of the International Convention on Arrest of Ships of 12 March 1999 provides that:

> "Any State may, at the time of signature, ratification, acceptance, or accession, *or at any time thereafter*, reserve the right to exclude the application of this Convention to any or all of the following: ...".

[1146] See also article 26 of the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes: "A Contracting State having at the date of the entry into force of the Convention for that State a complex system of national allegiance may specify *from time to time* by declaration how a reference to its national law shall be construed for the purposes of the Convention". This provision may refer to an interpretative declaration rather than to a reservation.

[1147] This Convention entered into force on 1 April 1995; it seems that no State party has exercised the option envisaged in this provision. See also article 5 of the 1978 Additional Protocol to the European Convention on Information on Foreign Law, "[a]ny Contracting Party which is bound by the provisions of both chapters I and II may at any time declare by means of a notification addressed to the Secretary General of the Council of Europe that it will only be bound by one or the other of chapters I and II. Such notification shall take effect six months after the date of the receipt of such notification".

(4) This is not especially problematic in itself and is in conformity with the idea that the Vienna rules are only of a residual nature (as the guidelines in the Guide to Practice will be, and with all the more reason). However, since what is involved is a derogation from a rule now accepted as customary and enshrined in the Vienna Conventions, it seems necessary that such a derogation should be expressly provided for in the treaty. The Commission wanted to clarify this principle in the text of draft guideline 2.3.1 although this was not legally indispensable in order to emphasize the exceptional character that the late formulation of reservations should have.

(5) It is true that the European Commission on Human Rights was flexible in this respect, having appeared to rule that a State party to the Rome Convention could invoke the amendment of national legislation covered by an earlier reservation to modify, at the same time, the scope of that reservation without violating the time limit placed on the option of formulating reservations by article 64 of the Convention. The scope of this precedent[1148] is not clear, however, and it may be that the Commission took this position because, in reality, the amendment of its legislation did not in fact result in an additional limitation on the obligations of the State concerned.[1149]

(6) Whatever the case, the requirement that there should be a clause expressly authorizing the formulation of a reservation after expression of consent to be bound seems all the more crucial given that it was necessary, for particularly pressing practical reasons, which the Commission set out in its commentary to draft guideline 1.1.2, to include a time limit in the definition of reservations itself: "The idea of including time limits on the possibility of making reservations in the definition of reservations itself has progressively gained ground, given the magnitude of the drawbacks in terms of stability of legal relations of a system which would allow parties to formulate a reservation at any moment. It is in fact the principle *pacta sunt servanda* itself which would be called into question, in that at any moment a party to a treaty could, by formulating a reservation, call its treaty obligations into question; in addition, this

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[1148] See, for instance, *Association X v. Austria*, application 473/59, Yearbook of the European Convention on Human Rights No. 2, p. 405; *X v. Austria*, application 1731/62, ibid., No. 7, p. 192; or *X v. Austria*, application 8180/78, DR 20, p. 26.

[1149] In case 1731/62, the Commission took the view that "the reservation made by Austria on 3 September 1958 ... covers the law of 5 July 1962, *the result of which was not to enlarge* a posteriori *the field removed from the control of the Commission*", Yearbook of the European Convention on Human Rights No. 7, p. 202 - italics added.

would excessively complicate the task of the depositary."[1150] Because the late formulation of reservations should be avoided as much as possible, the words "Unless the treaty provides otherwise" at the beginning of draft guideline 2.3.1 should be interpreted narrowly.

(7) This basic requirement of an express provision is not, however, the only exception to the rule that a reservation must, in principle, be made not later than the moment at which consent to be bound is expressed.

(8) It emerges from current practice that the other contracting parties may unanimously accept a late reservation and this consent (which may be tacit) can be seen as a collateral agreement extending *ratione temporis* the option of formulating reservations - if not reservations to the treaty concerned in general, then at least the reservation or reservations in question.

(9) This possibility has been seen as translating the principle that "the parties are the ultimate guardians of a treaty and may be prepared to countenance unusual procedures to deal with particular problems".[1151] In any event, as has been pointed out, "[t]he solution must be understood as dictated by pragmatic considerations. A party remains always[1152] at liberty to accede anew to the same treaty, this time by proposing certain reservations. As the result will remain the same whichever of these two alternatives one might choose, it seemed simply more expedient to settle for the more rapid procedure ...".[1153]

(10) Initially, the Secretary-General of the United Nations, in keeping with his great caution in this area since the 1950s, had held to the position that "[i]n accordance with established international practice to which the Secretary-General conforms in his capacity as depositary, a

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[1150] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. (3), pp. 206-207.

[1151] D.W. Greig, "Reservations: Equity as a Balancing Factor?", *AYIL, 1995*, pp. 28-29.

[1152] The author is referring to a specific treaty: the Convention of 19 March 1931 providing a Uniform Law for Cheques (see para. (10) of the commentary to this draft guideline), in which article VIII expressly provides for the option of denunciation; but the practice also applies in the case of treaties that do not include a withdrawal clause (see para. (12) of the commentary to this draft guideline).

[1153] Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988, p. 43.

reservation may be formulated only at the time of signature, ratification or accession" and, as a result, he had taken the view that a party to the Convention on the Elimination of All Forms of Racial Discrimination which did not make any reservations at the time of ratification was not entitled to make any later.[1154] Two years later, however, he softened his position considerably in a letter to the Permanent Mission to the United Nations of France,[1155] which was considering the possibility of denouncing the Convention of 1931 providing a Uniform Law for Cheques with a view to reacceding to it with new reservations. Taking as a basis "the general principle that the parties to an international agreement may, by unanimous decision, amend the provisions of an agreement or take such measures as they deem appropriate with respect to the application or interpretation of that agreement", the Legal Counsel states:

> "Consequently, it would appear that your Government could address to the Secretary-General, over the signature of the Minister for Foreign Affairs, a letter communicating the proposed reservation together with an indication of the date, if any, on which it is decided that it should take effect. The proposed reservation would be communicated to the States concerned (States parties, Contracting States and signatory States) by the Secretary-General and, in the absence of any objection by States parties within 90 days from the date of that communication (the period traditionally set, according to the practice of the Secretary-General, for the purpose of tacit acceptance and corresponding, in the present case, to the period specified in the third paragraph of article I of the [1931] Convention for acceptance of the reservations referred to in articles 9, 22, 27 and 30 of annex II), the reservation would be considered to take effect on the date indicated."[1156]

[1154] Memorandum to the Director of the Division of Human Rights, 5 April 1976, *United Nations Juridical Yearbook* 1976, p. 221.

[1155] Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988, p. 42.

[1156] Letter dated 14 September 1978, *United Nations Juridical Yearbook 1978*, pp. 199-200.

(11) That is what happened: the French Government addressed to the Secretary-General, on 7 February 1979, a letter drafted in accordance with this information; the Secretary-General circulated this letter on 10 February and "[s]ince no objections by the Contracting States were received within 90 days from the date of circulation of this communication … the reservation was deemed accepted and took effect on 11 May 1979".[1157]

(12) Since then, the Secretary-General of the United Nations appears to have adhered continuously to this practice in the performance of his functions as depositary.[1158] It was formalized in a legal opinion of the Secretariat of 19 June 1984 to the effect that "the parties to a treaty may always decide, *unanimously*, at any time, to accept a reservation in the absence of, or even contrary to, specific provisions in the treaty" and irrespective of whether the treaty contains express provisions as to when reservations may be formulated.[1159]

(13) This practice is not limited to the treaties of which the Secretary-General is the depositary. In the above-mentioned 1978 legal opinion,[1160] the Legal Counsel of the United Nations referred to a precedent involving a late reservation to the Customs Convention

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[1157] *Multilateral treaties deposited with the Secretary-General* ..., vol. II, p. 422, note 4; curiously, the Government of the Federal Republic of Germany expressly stated, on 20 February 1980, that it "raise[d] no objections thereto".

[1158] In addition to the examples given by Giorgio Gaja, "Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification - Études en l'honneur de Roberto Ago*, Milan, Giuffrè, 1987, vol. I, p. 311, see, for instance, Belgium's reservation (which in fact amounts to a general objection to the reservations formulated by other parties) to the 1969 Convention on the Law of Treaties: while this country had acceded to the Convention on 1 September 1992, "[o]n 18 February 1993, the Government of Belgium notified the Secretary-General that its instrument of accession should have specified that the said accession was made subject to the said reservation. None of the Contracting Parties to the Agreement having notified the Secretary-General of an objection either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of its circulation (23 March 1993), the reservation is deemed to have been accepted" (*Multilateral treaties deposited with the Secretary-General* ..., vol. II, p. 275, note 9).

[1159] Letter to a governmental official of a Member State, *United Nations Juridical Yearbook* 1984, p. 183; the italics are contained in the original text.

[1160] Para. (10) of the commentary to this draft guideline.

of 6 October 1960 on the Temporary Importation of Packings, which was deposited with the Secretary-General of the Customs Cooperation Council and article 20 of which "provides that any Contracting Party may, at the time of signing and ratifying the Convention, declare that it does not consider itself bound by article 2 of the Convention. Switzerland, which had ratified the Convention on 30 April 1963, made a reservation on 21 December 1965 which was submitted by the depositary to the States concerned and, in the absence of any objection, was considered accepted with retroactive effect to 31 July 1963".[1161]

(14) Several States parties to the 1978 Protocol to the International Convention of 1973 for the Prevention of Pollution from Ships (MARPOL), which entered into force on 2 October 1983, have widened the scope of their earlier reservations[1162] or added new ones after expressing their consent to be bound.[1163] Likewise, late reservations to certain conventions of the Council of Europe have been formulated without any objection being raised.[1164]

[1161] Letter to the Permanent Mission of a Member State to the United Nations, 14 September 1978, *United Nations Juridical Yearbook* 1978, pp. 199-200.

[1162] France (ratification 25 September 1981; amendment 11 August 1982: IMO, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions as at 31 December 1999*, p. 77).

[1163] Liberia (ratification 28 October 1980, new reservations 27 July 1983, subject of a procès-verbal of 31 August 1983), ibid., p. 81; Romania (accession 8 March 1993, rectified subsequently, in the absence of any objection, to include reservations adopted by Parliament), ibid., p. 83;-United States of America (ratification 12 August 1980, reservations communicated 27 July 1983, subject of a procès-verbal of rectification of 31 August 1983), ibid., p. 86. In the case of Liberia and the United States, the French Government stated that, in view of their nature, it had no objection to those rectifications, but such a decision could not constitute a precedent.

[1164] See, for example, Greece's reservation to the European Convention on the Suppression of Terrorism of 27 January 1977 (ratification 4 August 1988; rectification communicated to the Secretary-General 5 September 1988. Greece invoked an error; the reservation expressly formulated in the act authorizing ratification had not been transmitted. Internet site: http://conventions.coe.int/treaty/EN/cadreprincipal.htm); Portugal's reservations to the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters (deposit of the instrument of ratification 27 September 1994; entry into force of the Convention for Portugal 26 December 1994; notification of reservations and declarations 19 December 1996. In this case, too, Portugal invoked an error due to the non-transmission of the reservations contained in the Assembly resolution and the Decree of the President of the Republic

(15) As these examples show, it is not out of the question that late reservations should be deemed to have been legitimately made, in the absence of any objection by the other contracting parties consulted by the depositary. But they also show that the cases involved have almost always been fairly borderline ones: either the delay in communicating the reservation was minimal or the notification occurred after ratification, but before the entry into force of the treaty for the reserving State,[1165] or else the planned reservation was duly published in the official publications, but "forgotten" at the time of the deposit of the instrument of notification, something which can, at a pinch, be regarded as "rectification of a material error".

(16) A pamphlet published by the Council of Europe emphasizes the exceptional nature of the derogations permitted within that organization from the agreed rules on formulating reservations: "Accepting the belated formulation of reservations may create a dangerous precedent which could be invoked by other States in order to formulate new reservations or to widen the scope of existing ones. Such practice would jeopardize legal certainty and impair the uniform implementation of European treaties."[1166] For the same reasons, some authors are reluctant to acknowledge the existence of such a derogation from the principle of the limitation *ratione temporis* of the possibility of formulating reservations.[1167]

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published in the Official Gazette of the Portuguese Republic. Internet site: http://conventions.coe.int/treaty/EN/cadreprincipal.htm); or the "declaration" by the Netherlands of 14 October 1987 restricting the scope of its ratification (on 14 February 1969) of the European Convention on Extradition of 13 December 1957 (Internet site: http://conventions.coe.int/treaty/EN/cadreprincipal.htm). See also the example of the late reservations of Belgium and Denmark to the European Agreement on the Protection of Television Broadcasts cited by Giorgio Gaja ("Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification - Études en l'honneur de Roberto Ago*, Milan, Giuffrè, 1987, vol. I, p. 311).

[1165] In this connection, Giorgio Gaja cites two reservations added on 26 October 1976 by the Federal Republic of Germany to its instrument of ratification (dated 2 August 1976) of the Convention of 1954 relating to the Status of Stateless Persons (cf. *Multilateral treaties deposited with the Secretary-General* … vol. I, p. 279, note 4).

[1166] Jörg Polakiewicz, *Treaty-Making in the Council of Europe,* Strasbourg, 1999, p. 94.

[1167] Cf. R.W. Edwards, Jr., "Reservations to Treaties", *Michigan Journal of International Law* 1989, p. 383, or R. Baratta, *Gli effeti delle riserve ai trattati*, Milan, Giuffrè, 1999, p. 27, note 65.

(17) These are also the considerations that led the members of the Commission to consider that particular caution should be shown in sanctioning a practice which ought to remain exceptional and narrowly circumscribed. For that reason, the Commission decided to give a negative formulation to the rule contained in draft guideline 2.3.1: the principle *is, and must remain, that the late formulation of a reservation is not lawful; it may become so, in the most exceptional cases, only if none of the other Contracting Parties objects.*[1168]

(18) Yet it is a fact that "[a]ll the instances of practice here recalled point to the existence of a rule that allows States to make reservations even after they have expressed their consent to be bound by a treaty, provided that the other contracting States acquiesce to the making of reservations at that stage".[1169] In fact, it is difficult to imagine what might prevent all the contracting States from agreeing to such a derogation, whether this agreement is seen as an amendment to the treaty or as the mark of the "collectivization" of control over the permissibility of reservations.[1170]

(19) It is this requirement of unanimity, be it passive or tacit,[1171] that makes the exception to the principle acceptable and limits the risk of abuse. It is an indissociable element of this derogation, observable in current practice and consistent with the role of "guardian" of the treaty that States parties may collectively assume.[1172] But this requirement is not meaningful, nor does

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[1168] On the problems to which the word "object" gives rise, see para. (23) of the commentary to this draft guideline.

[1169] Giorgio Gaja, "Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification - Études en l'honneur de Roberto Ago*, Milan, Giuffrè, 1987, vol. I, p. 312.

[1170] This "control" must, of course, be exercised in conjunction with the "organs of control", where they exist. In the *Chrysostomos/Loizidou* cases, control by States over the permissibility *ratione temporis* of reservations (introduced by Turkey by means of an optional statement accepting individual petitions) was superseded by the organs of the European Convention on Human Rights (see paras. (5) and (6)) of the commentary to draft guideline 2.3.4.

[1171] Draft guidelines 2.3.2 and 2.3.3 explain the terms and conditions concerning the acceptance of the late formulation of a reservation.

[1172] See para. (9) of the commentary to this draft guideline.

it fulfil its objectives, unless a single objection renders the reservation impossible. Failing this, the very principle established in the first phrase of article 19 of the 1969 and 1986 Vienna Conventions would be reduced to nothing: any State could add a new reservation to its acceptance of a treaty at any time because there would always be one other contracting State that would not object to such a reservation and the situation would revert to that in which States or international organizations find themselves at the time of becoming parties, when they enjoy broad scope for formulating reservations, subject only to the limits set in articles 19 and 20.

(20) The caution demonstrated in practice and the clarifications provided on several occasions by the Secretary-General, together with doctrinal considerations and concerns relating to the maintenance of legal certainty, justify, in this particular instance, the strict application of the rule of unanimity, it being understood that, contrary to the traditional rules applicable to all reservations (except in Latin America), this unanimity concerns the acceptance of (or at least the absence of any objection to) late reservations. It is without effect, however, on the participation of the reserving State (or international organization) in the treaty itself: in the event of an objection, it remains bound, in accordance with the initial expression of its consent; and it can opt out (with a view to reacceding subsequently and formulating anew the rejected reservations) only in conformity with either the provisions of the treaty itself or the general rules codified in articles 54 to 64 of the Vienna Conventions.

(21) The question also arises whether a distinction should not be made between, on the one hand, objections in principle to the formulation of late reservations and, on the other hand, traditional objections, such as those that can be made to reservations pursuant to article 20, paragraph 4 (b), of the 1969 and 1986 Vienna Conventions. This distinction appears to be necessary, for it is hard to see why co-contracting States or international organizations should not have a choice between all or nothing, that is to say, either accepting both the reservation itself and its lateness or preventing the State or organization which formulated it from doing so, whereas they may have reasons that are acceptable to their partners. Furthermore, in the absence of such a distinction, States and international organizations which are not parties when the late reservation is formulated, but which become parties subsequently through accession or other

means would be confronted with a fait accompli. Paradoxically, they could not object to a late reservation, whereas they are permitted to do so under article 20, paragraph 5,[1173] relating to reservations formulated when the reserving State expresses its consent to be bound.[1174]

(22) The unanimous consent of the other contracting parties should therefore be regarded as necessary for the *late formulation* of reservations. On the other hand, the normal rules regarding acceptance of and objections to reservations, as codified in articles 20 to 23 of the Vienna Conventions, should be applicable with regard to the actual content of late reservations, to which the other parties should be able to object "as usual", a point to which the Commission intends to return in the section of the Guide to Practice on objections to reservations.

(23) In view of this possibility, which cannot be ruled out, at least intellectually (even if it does not seem to have been used in practice to date[1175]), some members of the Commission wondered whether it was appropriate to use the word "objects" in draft guideline 2.3.1 to refer to the opposition of a State not to the planned reservation, but to its very formulation.[1176] Nevertheless, most members took the view that it was inadvisable to introduce the distinction formally, since in practice the two operations are indistinguishable.

2.3.2 Acceptance of late formulation of a reservation

Unless the treaty provides otherwise or the well-established practice followed by the depositary differs, late formulation of a reservation shall be deemed to have been accepted by a contracting party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

[1173] "... a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation *or by the date on which it expressed its consent to be bound by the treaty, whichever is later*"(italics added).

[1174] It would be equally paradoxical to allow States or international organizations which become parties to the treaty after the reservation is entered to object to it under article 20, paragraph 4 (b), whereas the original parties cannot do so.

[1175] Some late reservations have, however, been expressly accepted (for an example, see footnote 1157 above).

[1176] In that case, the words "except if none of the other contracting Parties *objects to the late formulation of the reservation*" at the end of the draft guideline could have been replaced by the words "... if none of the other contracting Parties *is opposed to* the late formulation of the reservation".

Commentary

(1) The purpose of draft guideline 2.3.2 is to clarify and supplement the last part of draft guideline 2.3.1 which rules out any possibility of the late formulation of a reservation "except if none of the other contracting Parties objects to the late formulation of the reservation".

(2) Some members of the Commission who were concerned to restrict the practice of the late formulation of reservations as far as possible believed that such a practice should require express acceptance.

(3) According to the dominant opinion, it appeared, however, that, just as reservations formulated within the set periods may be accepted tacitly,[1177] it should likewise be possible for late reservations to be accepted in that manner (whether their late formulation or their content is at issue) and for the same reasons. It seems fairly clear that to require an express unanimous consent would rob of any substance the (at least incipient) rule that late reservations are possible under certain conditions (which must be strict), for, in practice, the express acceptance of reservations at any time is rare indeed. In fact, requiring such acceptance would be tantamount to ruling out any possibility of the late formulation of a reservation. It is hardly conceivable that all the contracting States to a universal treaty would expressly accept such a request within a reasonable period of time.

(4) Moreover, that would call into question the practice followed by the Secretary-General of the United Nations and by the secretaries-general of the Customs Cooperation Council (World Customs Organizations (WCO)), the International Maritime Organization (IMO) and the Council of Europe,[1178] all of whom considered that certain reservations which had been formulated late, had entered into force in the absence of objections from the other contracting parties.

(5) It remains to be determined, however, how much time the other contracting parties have to oppose the late formulation of a reservation. There are two conflicting sets of considerations in this regard. On the one hand, it must be left to the other contracting States to examine the

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[1177] Cf. article 20, paragraph 5, of the Vienna Conventions (in the 1986 text): "unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of the period of 12 months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty ...".

[1178] See paras. (10) to (14) of the commentary to draft guideline 2.3.1.

planned reservation and respond to it; on the other, a long period of time extends the period of uncertainty about the fate of the reservation (and therefore of contractual relations) correspondingly.

(6) Practice in this respect is ambiguous. It seems that the secretaries-general of IMO, the Council of Europe and WCO proceeded in an empirical manner and did not set any specific periods when they consulted the other contracting parties.[1179] That was not true for the Secretary General of the United Nations.

(7) In the first place, when the Secretary-General's current practice was inaugurated in the 1970s, the parties were given a period of 90 days in which "to object" to a late reservation, where appropriate. Nevertheless, the choice of this period seems to have been somewhat circumstantial: it happens to have coincided with the period provided for in the relevant provisions of the 1931 Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques, to which France wanted to make a new reservation.[1180] That notwithstanding, the 90-day period was adopted whenever a State availed itself thereafter of the opportunity to formulate a new reservation, or modify an existing one, after the entry into force with respect to that State of a new treaty of which the Secretary-General was the depositary.[1181]

(8) In practice, however, this 90-day period proved to be too short; owing to the delays in transmission of the communication by the Office of the Legal Counsel to States, the latter had very little time in which to examine these notifications and respond to them, whereas such communications are likely to raise "complex questions of law" for the parties to a treaty, requiring "consultations among them, in deciding what, if any, action should be taken in respect

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[1179] It would appear, however, that the Secretary-General of IMO considers that, in the absence of a response within one month following notification, the reservation becomes effective (cf. footnote 1163 above and IMO, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions as at 31 December 1999*, concerning the reservation of Liberia, p. 81 and that of the United States, p. 86).

[1180] See paras. (10) and (11) of the commentary to draft guideline 2.3.1.

[1181] Ibid., para. (12).

of such a communication".[1182] It is significant, moreover, that, in the few situations in which parties took action, such actions were formulated well after the 90-day period that had theoretically been set for them.[1183] For this reason, following a note verbale from Portugal reporting, on behalf of the European Union, on difficulties linked to the 90-day period, the Secretary-General announced, in a circular addressed to all Member States, a change in the practice in that area. From then on,

> "if a State which had already expressed its consent to be bound by a treaty formulated a reservation to that treaty, the other parties would have a period of 12 months after the Secretary-General had circulated the reservation to inform him that they wished to object to it".[1184]

(9) In taking this decision, which will also apply to the amendment of an existing reservation, "the Secretary-General [was] guided by article 20, paragraph 5, of the [Vienna] Convention, which indicates a period of 12 months to be appropriate for Governments to analyse and assess a reservation that has been formulated by another State and to decide upon what action, if any, should be taken in respect of it".[1185]

(10) Some members of the Commission expressed some concerns about the length of that period, which has the drawback that, during the 12 months following notification by the Secretary-General,[1186] total uncertainty prevails as to the fate of the reservation that has been formulated and, if a single State objects to it at the last minute, that is sufficient to consider it as not having been made. These members then wondered whether an intermediate solution (six months, for example) would not have been wiser. Nevertheless, taking into account the

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[1182] Memorandum from the United Nations Legal Counsel addressed to the Permanent Representatives of States Members of the United Nations, 4 April 2000 (LA 41 TR/221 (23-1)).

[1183] Cf. the response by Germany to the French reservation to the 1931 Convention on Cheques, issued one year following the date of the French communication (see footnote 1157 in the commentary to draft guideline 2.3.1.)

[1184] See footnote 1182 above.

[1185] Ibid.

[1186] In other words, not the communication from the State announcing its intention to formulate a late reservation. This may seem debatable, for the fate of the reservation depends on how fast the depositary acts.

provisions of article 20, paragraph 5, of the Vienna Conventions and the recent announcement of the Secretary-General of his intentions, the Commission considered that it made more sense to bring its own position - which, in any event, has to do with progressive development and not with codification in the strict sense - into line with those intentions.

(11) Likewise, in view of the different practices followed by other international organizations acting as depositaries,[1187] the Commission took the view that it would be wise to reserve the possibility for a depositary to maintain its usual practice, provided that it has not elicited any particular objections. In practice, that is of little concern save to international depositary organizations; some members of the Commission nevertheless thought that it was inadvisable to rule out such a possibility a priori when the depositary was a State or Government.

(12) The wording of draft guideline 2.3.2, which tries not to call into question the practice actually followed, while at the same time guiding it, is based on the provisions of article 20, paragraph 5, of the 1986 Vienna Convention,[1188] but adapts them to the specific case of the late formulation of reservations.

2.3.3 Objection to late formulation of a reservation

If a contracting Party to a treaty objects to late formulation of a reservation, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being established.

Commentary

(1) Draft guideline 2.3.3 draws the consequences of an objection made by a contracting State or international organization to the late formulation of a reservation: it follows from draft guideline 2.3.1 that such a reservation is in principle impossible and that a single "objection" is sufficient to prevent it from producing any effect. That is what is necessarily implied by the expression "except if *none* of the other contracting Parties objects".

[1187] See para. (6) of the commentary to this draft guideline.

[1188] "… unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation by the end of a period of 12 months after it was notified of the reservation …".

(2) Given the strict interpretation the Commission intends to give to this rule,[1189] it seemed useful to explain its consequences, i.e. that conventional relations remain unaffected by the declaration made by the State or the international organization which is its author and that this declaration may not be considered a reservation, which is the meaning of the expression: "without the reservation being established …", borrowed from article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions.[1190]

(3) On the other hand, the objection, which its author does not have to justify, produces its full effects when lodged within the 12-month period indicated in draft guideline 2.3.2. This is why the Commission uses the word "objects", as opposed to "*formulates*", for an intended reservation.

(4) The Commission is aware of the fact that, by including this provision in the section of the Guide to Practice relating to the late formulation of reservations, it seems to be departing from the rule it established that it would deal in chapter 2 of the Guide only with questions of procedure, to the exclusion of the effects which irregularities marring that procedure might produce. However, it seems to the Commission that this apparent breach of the rule is justified by the fact that, in the present case, an objection not only prevents the declaration of the author of the intended reservation from producing effects, but also creates an obstacle to it being deemed a reservation.

(5) It is therefore advisable not to equate the "objections" in question here with those which are the subject of articles 20 to 23 of the Vienna Conventions: while these prevent a genuine reservation from producing all its effects in the relations between its author and the State or international organization which is objecting to it, an "objection" to the late formulation of a reservation "destroys" the latter as a reservation. It was to avoid such confusion that some members of the Commission wanted to use different terminology in draft guidelines 2.3.1 to 2.3.3.[1191] However, a majority of members considered such a distinction pointless.[1192]

[1189] See commentary to draft guideline 2.3.1, especially paras. (6), (16) and (17).

[1190] "A reservation established with regard to another party in accordance with articles 19, 20 and 23 …".

[1191] See paras. (21) to (23) to the commentary to draft guideline 2.3.1 and especially footnote 1176.

[1192] Ibid., para. (23).

(6) The Commission also debated the particular procedures which should be followed for objecting to the late formulation of a reservation to the constituent instrument of an international organization. According to article 20, paragraph 3, of the 1969 and 1986 Vienna Conventions:

> "When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization."

Applying as it does to reservations formulated "in time", this rule applies a fortiori when the formulation is late. This appears to be so obvious that it is not deemed useful to state it formally in a draft guideline, on the understanding that the principle established in this provision will be taken up in the relevant section of the Guide to Practice.

2.3.4 Subsequent exclusion or modification of the legal effect of a treaty by means other than reservations

A contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

(a) Interpretation of a reservation made earlier; or

(b) A unilateral statement made subsequently under an optional clause.

Commentary

(1) The Commission intends to expand on and clarify the consequences of the principle stated in draft guideline 2.3.1 when it considers problems relating to effects and the permissibility of reservations (since the fundamental questions are clearly how to determine the consequences produced, on the one hand, by the late formulation of a reservation and, on the other hand, by its possible entry into force when it has not given rise to any objection). It nevertheless seemed to the Commission that the exclusion in principle of "late reservations" should be made even stricter by the adoption of draft guideline 2.3.4, the purpose of which is to indicate that a party to a treaty may not get round this prohibition by means which have the same purpose as reservations, but do not meet the definition of reservations. Otherwise, the "chapeau" of article 19 of the 1969 and 1986 Vienna Conventions[1193] would be deprived of any specific scope.

[1193] For the text of this provision, see footnote 1137 in the commentary to draft guideline 2.3.1. The Commission has not considered it necessary formally to reproduce in the Guide to Practice the rule enunciated in this provision: that would overlap with the definition set out in draft guidelines 1.1 and 1.1.2.

(2) To this end, draft guideline 2.3.4 targets two means in particular: the (extensive) interpretation of reservations made earlier, on the one hand, and statements made under an optional clause appearing in a treaty, on the other. The selection of these two means of "circumvention" may be explained by the fact that they have both been used in practice and that this use has given rise to jurisprudence that is accepted as authoritative. One cannot, however, rule out the possibility that States or international organizations might have recourse in the future to other means of getting round the principle stated by draft guideline 2.3.1; it goes without saying that the reasoning which justifies the express prohibitions enunciated in draft guideline 2.3.4 should therefore be applied *mutatis mutandis*.

(3) The principle that a reservation may not be formulated after the expression of definitive consent to be bound appeared to be sufficiently established at the Inter-American Court of Human Rights for the Court to consider, in its advisory opinion of 8 September 1983 concerning *Restrictions to the death penalty*, that, once made,[1194] a reservation "escapes" from its author and may not be interpreted outside the context of the treaty itself. The Court adds the following:

> "A contrary approach might ultimately lead to the conclusion that the State is the sole arbiter of the extent of its international obligations on all matters to which its reservation related, including even all such matters which the State might subsequently declare that it intended the reservation to cover.
>
> "The latter result cannot be squared with the Vienna Convention, which provides that a reservation can be made only when signing, ratifying, accepting, approving or acceding to a treaty (Vienna Convention, art. 19)."[1195]

[1194] The word "made" is probably more appropriate here than "formulated", since the Inter-American Court of Human Rights considers (perhaps questionably) that "a reservation becomes an integral part of the treaty", which is conceivable only if it is "in effect".

[1195] Advisory opinion OC-3/83, paras. 63-64. On the interpretation of this advisory opinion see Giorgio Gaja, "Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification - Études en l'honneur de Roberto Ago*, Milan, Giuffrè, vol. I, p. 310.

(4) In the same way, following the *Belilos* case,[1196] the Swiss Government initially revised its 1974 "interpretative declaration", which the Strasbourg Court regarded as an impermissible reservation, by adding a number of clarifications to its new "declaration".[1197] The permissibility of this new declaration, which was criticized by the relevant doctrine,[1198] was challenged before the Federal Court, which, in its decision *Elisabeth B. v. Council of State of Thurgau Canton* of 17 December 1992, declared the declaration invalid on the ground that it was a new reservation[1199] that was incompatible with article 64, paragraph 1, of the European Convention on Human Rights.[1200] *Mutatis mutandis*, the limit on the formulation of reservations imposed by article 64 of the Rome Convention is similar to the limit resulting from article 19 of the Vienna Conventions, and the judgement of the Swiss Federal Court should certainly be regarded as a reaffirmation of the prohibition in principle on reservations formulated following the definitive expression of consent to be bound, but it goes further and establishes the impossibility of formulating a new reservation in the guise of an interpretation of an existing reservation.

[1196] European Court of Human Rights, judgement of 29 April 1988, Series A, No. 132.

[1197] See Council of Europe, European Court of Human Rights, *Reservations and declarations*, European Treaty Series (ETS), No. 5.

[1198] See, in particular, G. Cohen-Jonathan, "Les réserves à la Convention européenne des droits de l'homme", *R.G.D.I.P.* 1989, p. 314. Also see the other references made by J.-F. Flauss, "Le contentieux de la validité des réserves à la CEDH devant le Tribunal fédéral suisse: Requiem pour la déclaration interprétative relative à l'article 6, paragraphe 1", *R.U.D.H.* 1993, note 28, p. 300.

[1199] The European Court of Human Rights would have declared the 1974 "declaration" as a whole invalid: "the interpretative declaration concerning article 6, paragraph 1, European Court of Human Rights, formulated by the Federal Council at the time of ratification could therefore not have a full effect in either the field of criminal law or in that of civil law. As a result, the 1988 interpretative declaration cannot be regarded as a restriction, a new formulation or a clarification of the reservation that existed previously. Rather, it represents a reservation formulated subsequently" (*Journal des Tribunaux*, 1995, p. 536; German text in *EuGRZ* 1993, p. 72).

[1200] ... "Any State may, when signing this Convention or when depositing an instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article".

(5) The decision of the European Commission on Human Rights in the *Chrysostomos et al.* case leads to the same conclusion, but provides an additional lesson. In the case in question, the Commission believed that it followed from the "clear wording" of article 64, paragraph 1, of the European Convention on Human Rights "that a High Contracting Party may not, in subsequent recognition of the individual right of appeal, make a major change in its obligations arising from the Convention for the purposes of procedures under article 25".[1201] Here again, the decision of the European Commission may be interpreted as a confirmation of the rule resulting from the introductory wording of the provision in question, with the important clarification that a State may not circumvent the prohibition on reservations following ratification by adding to a declaration made under an opting-in clause (which does not in itself constitute a reservation)[1202] conditions or limitations with effects identical to those of a reservation, at least in cases where the optional clause in question does not make any corresponding provision.

(6) Although, in the *Loizidou* judgement of 23 March 1995, the Court was not as precise, the following passage can be regarded as a reaffirmation of the position in question:

> "The Court further notes that article 64 of the Convention enables States to enter reservations when signing the Convention or when depositing their instruments of ratification. The power to make reservations under article 64 is, however, a limited one, being confined to particular provisions of the Convention …"[1203]

(7) The decisions of the Inter-American Court of Human Rights, the European Court of Human Rights and the Swiss Federal Court reaffirm the stringency of the rule set out at the beginning of article 19 of the Vienna Conventions on the Law of Treaties and in draft guideline 2.3.1 and draw very direct and specific consequences therefrom, as is made explicit in draft guideline 2.3.4.

(8) Paragraph (b) of this draft guideline refers implicitly to draft guideline 1.4.6 and, less directly, to draft guideline 1.4.7 relating to unilateral statements made under an optional clause and providing for a choice between the provisions of a treaty, which the Commission has clearly

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[1201] Decision of 4 March 1991, *R.U.D.H.* 1991, p. 200, para. 15.

[1202] See draft guidelines 1.4.6 and 1.4.7 and the commentaries thereto; in *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), pp. 241-252.

[1203] Publications of the European Court of Human Rights, Series A, vol. 310, p. 28, para. 76.

excluded from the scope of the Guide to Practice. However, the purpose of draft guideline 2.3.4 is not to regulate these procedures as such, but to act as a reminder that they cannot be used to circumvent the rules relating to reservations themselves.

(9) Some members of the Commission expressed doubts on the inclusion of this guideline because it used terms that lacked exactitude.

2.4.3 Time at which an interpretative declaration may be formulated

Without prejudice to the provisions of guidelines 1.2.1, 2.4.6 [2.4.7] and 2.4.7 [2.4.8], an interpretative declaration may be formulated at any time.

Commentary

(1) As a result *a contrario* of guideline 1.2, which defines interpretative declarations independently of any time element,[1204] a "simple" interpretative declaration (as opposed to a conditional interpretative declaration) may, unlike a reservation, be formulated at any time. It is therefore enough to refer to the Commission's commentaries to that provision,[1205] and draft guideline 1.4.3 follows specifically therefrom. This option is, however, not absolute and involves three exceptions.

(2) The first relates to the relatively frequent case of treaties providing expressly that interpretative declarations to them can be formulated only at a specified time or times, as in the case, for example, of article 310 of the United Nations Convention on the Law of the Sea.[1206] It is clear that, in a case of this kind, the contracting parties may make interpretative declarations such as those referred to in the relevant provision only at the time or times restrictively indicated in the treaty.

[1204] *Official Records of the General Assembly, Supplement No. 10* (A/54/10), p. 223.

[1205] Ibid., pp. 234-239, paras. (21) to (32) of the commentary.

[1206] "Article 309 [excluding reservations] does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and its regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effects of the provisions of this Convention in their application to that State." Also see, for example, article 26, paragraph 2, of the Basel Convention of 22 March 1989 on the Control of Transboundary Movements of Hazardous Wastes and article 43 of the New York Agreement of 4 August 1995 on Straddling Fish Stocks.

(3) The Commission questioned whether this exception, which actually seems quite obvious, should be mentioned in draft guideline 2.4.3, but it found that it was not necessary to be so specific: the Guide to Practice is intended to be exclusively residual in nature and it goes without saying that the provisions of a treaty must be applicable as a matter of priority if they are contrary to the guidelines contained in the Guide.[1207] It seemed advisable, however, to provide for the very specific case of the late formulation of an interpretative declaration when a treaty provision expressly limits the option of formulating such a reservation *ratione temporis*. This case is covered by draft guideline 2.4.6, to which draft guideline 2.4.3 refers.

(4) The existence of an express treaty provision limiting the option of formulating interpretative declarations is not the only instance in which a State or an international organization is prevented *ratione temporis* from formulating an interpretative declaration. The same applies in cases where the State or organization has already formulated an interpretation which its partners have taken as a basis or were entitled to take as a basis (estoppel). In such a case, the author of the initial declaration is prevented from modifying it. This hypothesis will be considered in connection with the draft guidelines relating to the modification of reservations and interpretative declarations.[1208]

(5) The third exception relates to conditional interpretative declarations, which, unlike simple interpretative declarations, cannot be formulated at any time, as stated in draft guideline 1.2.1 on the definition of such instruments,[1209] to which draft guideline 2.4.3 expressly refers.

[1207] The Commission nevertheless departed from this principle in a few cases when it decided to place the emphasis on the exceptional and derogative nature of the guidelines it was proposing (see, for example, guideline 2.3.1 and para. (6) of the commentary thereto, above).

[1208] See also para. (31) of the commentary to draft guideline 1.2, *Official Records of the General Assembly, Supplement No. 10* (A/54/10), p. 239.

[1209] "A unilateral statement formulated by a State or an international organization *when signing, ratifying, formally confirming, accepting, approving, or acceding to a treaty, or by a State when making a notification of succession to a treaty* … shall constitute a conditional interpretative declaration" (ibid., p. 240 (italics added); see paras. (15) to (18) of the commentary to this draft guideline, ibid., pp. 248-249).

(6) It also provides for the case covered by draft guideline 2.4.7 relating to the late formulation of a conditional interpretative declaration.

(7) Lastly, it appeared to be obvious that only an existing instrument could be interpreted and that it was therefore not necessary to specify that a declaration could be made only after the text of the treaty had been finally adopted.

2.4.4 [2.4.5] Non-requirement of confirmation of interpretative declarations made when signing a treaty

An interpretative declaration made when signing a treaty does not require subsequent confirmation when a State or an international organization expresses its consent to be bound by the treaty.

Commentary

(1) The rule that it is not necessary to confirm interpretative declarations made when signing a treaty in fact derives inevitably from the principle embodied in draft guideline 2.4.3. Since interpretative declarations may be made at any time, save in exceptional cases, it would be illogical and paradoxical to require that they should be confirmed when a State or an international organization expressed its final consent to be bound by the treaty.

(2) In this connection, there is a marked contrast between the rules applicable to reservations[1210] and those relating to interpretative declarations, since the principle is the exact opposite: reservations formulated when signing a treaty must in principle be confirmed, but interpretative declarations do not have to be.

(3) In the light of the very broad wording of draft guideline 2.4.4, the transposition to interpretative declarations of the principle established in draft guideline 2.2.2,[1211] according to which it is not necessary to confirm a reservation formulated when signing a treaty not subject to ratification (agreement in simplified form), would be pointless: the principle stated in draft guideline 2.4.4 is applicable to all categories of treaties, whether they enter into force solely as a result of their signature or are subject to ratification, approval, acceptance, formal confirmation or accession.

[1210] See draft guideline 2.2.1 and the commentary thereto.

[1211] See the commentary to this draft guideline.

(4) In practice, the opposition between the rules applicable to reservations, on the one hand, and to interpretative declarations, on the other, is nonetheless not as clear-cut as it may seem:

First, nothing prevents a State or an international organization which has made a declaration when signing from confirming it when expressing its final consent to be bound;

Secondly, the principle stated in draft guideline 2.4.4 is not applicable to conditional interpretative declarations, as clearly stated in draft guideline 2.4.5.

2.4.5 [2.4.4] Formal confirmation of conditional interpretative declarations formulated when signing a treaty

If a conditional interpretative declaration is formulated when signing a treaty subject to ratification, act of formal confirmation, acceptance or approval, it must be formally confirmed by the declaring State or international organization when expressing its consent to be bound by the treaty. In such a case the interpretative declaration shall be considered as having been made on the date of its confirmation.

Commentary

(1) Draft guideline 2.4.5 makes an important exception to the principle set out in draft guideline 2.4.4 whereby an interpretative declaration formulated when signing the treaty does not need to be confirmed by the author. This rule cannot apply to conditional interpretative declarations.

(2) In the case of the latter, the Commission noted in the commentary to draft guideline 1.2 that, if the conditional interpretative declaration had been formulated at the time of signature of the treaty, it should "Probably" be "confirmed at the time of the expression of definitive consent to be bound".[1212] There would appear to be no logical reason for a different solution as between reservations and conditional interpretative declarations, to which the other Parties must be in a position to react where necessary.

[1212] *Official Records of the General Assembly, Supplement No. 10* (A/55/10), footnote 346, p. 202.

(3) It will be noted that in practice States wishing to make their participation in a treaty subject to a specified interpretation of the treaty generally confirm their interpretation at the time of expression of definitive consent to be bound, when it has been formulated at the time of signature or at any earlier point in the negotiations.[1213]

(4) As a departure from the principle set out in draft guideline 2.4.4 for "simple" interpretative declarations, the rules concerning formal confirmation of reservations formulated on signature, contained in draft guideline 2.2.1, should therefore be transposed to conditional interpretative declarations.

2.4.6 [2.4.7] Late formulation of an interpretative declaration

Where a treaty provides that an interpretative declaration may be made only at specified times, a State or an international organization may not formulate an interpretative declaration concerning that treaty subsequently except if none of the other contracting Parties objects to the late formulation of the interpretative declaration.

Commentary

(1) Draft guideline 2.4.6 is the counterpart, for interpretative declarations, of draft guideline 2.3.1, relating to reservations.

(2) Despite the principle enunciated in draft guideline 2.4.3, whereby interpretative declarations may be made at any time after the adoption of the text of the treaty, interpretative declarations, like reservations, may be late. This is obviously true for conditional interpretations, which, like reservations themselves, can be formulated (or confirmed) only at the time of the

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[1213] Cf. the confirmation by Germany and the United Kingdom of their declarations formulated upon signing the Basel Convention of 1989 on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (see *Multilateral treaties deposited with the Secretary-General - Status as at 31 December 1999*, ST/LEG/SER.E/18 (vol. II), Sales No. E.00.V.2, pp. 336-357); see also the practice followed by Monaco upon signing and then ratifying the 1966 Covenant on Civil and Political Rights (*Multilateral treaties deposited with the Secretary-General - Status as at 31 December 1999,* ST/LEG/SER.E/18 (vol. I), Sales No. E.00.V.2, p. 139), by Austria in the case of the European Convention of 6 May 1959 on the Protection of the Archaeological Heritage (http://conventions.coe.int/treaty/EN/cadreprincipal.htm) or the European Community in regard to the 1991 Espoo Convention (*Multilateral treaties deposited with the Secretary-General - Status as at 31 December 1999,* ST/LEG/SER.E/18 (vol. II), Sales No. E.00.V.2, p. 363). See also the declarations by Italy or the United Kingdom concerning the 1992 Rio Convention on Biological Diversity (ibid., p. 379).

expression of definitive consent to be bound, as specified in draft guidelines 1.2.1[1214] and 2.4.5.[1215] But this may also be so in the case of simple interpretative declarations, particularly when the treaty itself establishes the period within which they may be made.[1216] The object of draft guideline 2.4.6 is to cover this situation, which is expressly allowed for in draft guideline 2.4.3.

(3) The Commission wishes to emphasize that this is not an academic question. For example, the Egyptian Government had in 1993 ratified the Basel Convention of 22 March 1989 on the Control of Transboundary Movements of Hazardous Wastes and their Disposal without attaching any particular declarations to its instrument of ratification, but on 31 January 1995 it formulated declarations interpreting certain provisions of the treaty,[1217] which limited such a possibility solely to the time of expression by a party of its consent to be bound.[1218] Since certain Parties to the Convention contested the admissibility of the Egyptian declarations, either because, in their view, the declarations were really reservations (prohibited by article 26, paragraph 1) or because they were late,[1219] the Secretary-General of the United Nations, the depositary of the Basel Convention, "in keeping with the depositary practice followed in similar cases, … proposed to receive the declarations in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the

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[1214] *Official Records of the General Assembly, Supplement No. 10* (A/54/10), p. 240.

[1215] See above.

[1216] See, paras. (2) and (3) of the commentary to draft guideline 2.4.3.

[1217] See *Multilateral treaties deposited with the Secretary-General - Status as at 31 December 1999*, vol. II (United Nations publication, Sales No. E.00.V.2), pp. 358-359.

[1218] Under article 26, paragraph 2, of the Convention, a State may, within certain limits, formulate such declarations, but only "when signing, ratifying, accepting, approving or formally confirming or acceding to this Convention".

[1219] See the observations by the United Kingdom, Finland, Italy, the Netherlands or Sweden (*Multilateral treaties deposited with the Secretary-General - Status as at 30 April 1995*, United Nations publication, Sales No. E.96.V.5, pp. 897-898 - the 2000 edition of this publication is incomprehensible).

procedure envisaged, within a period of 90 days from the date of their circulation".[1220] Subsequently, in view of the objections received from certain contracting States,[1221] he "[took] the view that he [was] not in a position to accept these declarations [formulated by Egypt] for deposit"[1222] and declined to include them in the section entitled "Declarations and Reservations" and reproduce them only in the section entitled "Notes", accompanied by the objections concerning them.

(4) It will be inferred from this example, which was not protested by any of the States parties to the Basel Convention that, in the particular, but not exceptional, case in which a treaty specifies the times at which interpretative declarations may be made, the same rules should be followed as those set out in draft guideline 2.3.1. The commentaries to that provision are therefore transposable, *mutatis mutandis*, to draft guideline 2.4.6.

(5) It is self-evident that the approaches laid down in draft guidelines 2.3.2 and 2.3.3[1223] can also be transposed to acceptances of interpretative declarations formulated late and objections to such formulation. Nevertheless, the Commission considered that it was not useful to overburden the Guide to Practice by including express draft guidelines in this respect.

2.4.7 [2.4.8] Late formulation of a conditional interpretative declaration

A State or an international organization may not formulate a conditional interpretative declaration concerning a treaty after expressing its consent to be bound by the treaty except if none of the other contracting Parties objects to the late formulation of the conditional interpretative declaration.

Commentary

(1) The considerations which led the Commission to adopt draft guideline 2.4.6 apply in all respects to draft guideline 2.4.7.

[1220] Ibid., p. 897.

[1221] Ibid., para. 328.

[1222] *Multilateral treaties deposited with the Secretary-General - Status as at 30 April 1995 …*, p. 897.

[1223] See above.

(2) It follows from draft guideline 1.2.1 that, like a reservation, a conditional interpretative declaration is "A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty …".[1224] Any conditional interpretative declaration not made at any of these times is therefore late and can be envisaged only if all the contracting parties consent, at least tacitly, to do so.

(3) The commentaries to draft guidelines 2.3.1 and 2.4.6 can therefore be fully transposed to draft guideline 2.4.7.

[1224] See paras. (15) to (18) of the commentary to draft guideline 1.2.1 in *General Assembly, Official Records, Supplement No. 10* (A/54/10), pp. 248-249.

CHAPTER VII

DIPLOMATIC PROTECTION

A. Introduction

158. The Commission at its forty-eighth session, in 1996, identified the topic of "Diplomatic protection" as one of three topics appropriate for codification and progressive development.[1225] In the same year, the General Assembly in its resolution 51/160 of 16 December 1996, invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above General Assembly resolution, established at its 2477th meeting a Working Group on the topic.[1226] The Working Group submitted a report at the same session which was endorsed by the Commission.[1227] The Working Group attempted to: (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur.[1228]

159. At its 2501st meeting, on 11 July 1997, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.

160. The General Assembly in paragraph 8 of its resolution 52/156 endorsed the decision of the Commission to include in its agenda the topic "Diplomatic protection".

[1225] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 249 and annex II, addendum 1.

[1226] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), chap. VIII.

[1227] Ibid., para. 171.

[1228] Ibid., paras. 189-190.

161. At its fiftieth session, in 1998, the Commission had before it the preliminary report of the Special Rapporteur.[1229] At the same session, the Commission established an open-ended Working Group to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic.[1230]

162. At its fifty-first session, in 1999, the Commission appointed Mr. Christopher John R. Dugard Special Rapporteur for the topic,[1231] after Mr. Bennouna was elected a judge to the International Criminal Tribunal for the Former Yugoslavia.

163. At its fifty-second session, in 2000, the Commission had before it the Special Rapporteur's first report (A/CN.4/506 and Corr.1 and Add.1). The Commission deferred its consideration of A/CN.4/506/Add.1 to the next session, due to the lack of time. At the same session, the Commission established an open-ended Informal Consultation, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.[1232] The Commission subsequently decided, at its 2635th meeting, to refer draft articles 1, 3 and 5 to 8 to the Drafting Committee together with the report of the Informal Consultation.

B. Consideration of the topic at the present session

164. At the present session, the Commission had before it the remainder of the Special Rapporteur's first report (A/CN.4/506/Add.1), as well as his second report (A/CN.4/514 and Corr.1 and 2 (Spanish only)). The Commission considered document A/CN.4/506/Add.1 at its 2680th and 2685th to 2687th meetings, held on 25 May and 9 to 11 July 2001, respectively. The Commission also considered the second report of the Special Rapporteur at its 2688th to 2690th meetings, held on 12 to 17 July 2001. Due to the lack of time, the Commission was only able to consider those parts of the second report covering draft articles 10 and 11, and deferred consideration of the remainder of document A/CN.4/514, concerning draft articles 12 and 13, to the next session.

[1229] A/CN.4/484.

[1230] The conclusions of the Working Group are contained in *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 108.

[1231] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* (A/54/10), para. 19.

[1232] The report of the informal consultations is contained in *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 495.

165. The Commission decided to refer draft article 9 to the Drafting Committee, at its 2688th meeting, held on 12 July 2001, as well as draft articles 10 and 11, at its 2690th meeting, held on 17 July 2001.

166. At its 2688th meeting, the Commission established an open-ended Informal Consultation on article 9, chaired by the Special Rapporteur.

1. Article 9[1233]

(a) Introduction by the Special Rapporteur

167. The Special Rapporteur, in introducing the addendum to his first report (A/CN.4/506/Add.1), dealing with draft article 9 on continuous nationality, observed that while the law of diplomatic protection was an area in which there was a substantial body of State practice, jurisprudence and doctrine, those sources of law all seemed to point in different directions. In large measure, the task facing the Commission was less one of formulating new rules than of choosing among them. The question of continuous nationality was a good illustration of that.

[1233] Draft article 9 reads:

Article 9

> 1. Where an injured person has undergone a *bona fide* change of nationality following an injury, the new State of nationality may exercise diplomatic protection on behalf of that person in respect of the injury, provided that the State of original nationality has not exercised or is not exercising diplomatic protection in respect of the injured person at the date on which the change of nationality occurs.
>
> 2. This rule applies where the claim has been transferred *bona fide* to a person or persons possessing the nationality of another State.
>
> 3. The change of nationality of an injured person or the transfer of the claim to a national of another State does not affect the right of the State of original nationality to bring a claim on its own behalf for injury to its general interests suffered through harm done to the injured person while he or she was still a national of that State.
>
> 4. Diplomatic protection may not be exercised by a new State of nationality against any previous State of nationality in respect of an injury suffered by a person when he or she was a national of the previous State of nationality.

A/CN.4/506/Add.1, p. 2.

168. According to the traditional view, a State could exercise diplomatic protection only on behalf of a person who had been a national of that State at the time of the injury on which the claim was based and who had continued to be a national up to and including the time of the presentation of the claim. That traditional view was supported by State practice and was to be found in many agreements. The rationale for the traditional view was, *inter alia*, to prevent individuals from seeking the State offering the most advantageous protection, thus preventing powerful States from becoming "claims agencies".

169. However, the traditional rule had been criticized on several grounds: it was difficult to reconcile with the Vattelian fiction that an injury to the national was an injury to the State itself; several judicial pronouncements existed questioning its validity as a general rule; its content was uncertain as there was no clarity regarding key notions such as "date of injury" (the *dies a quo*) and the date until which nationality must have continued (the *dies ad quem*); its rationale was no longer valid in that States were very cautious about conferring nationality, and the Court noted in The *Nottebohm* case[1234] a claimant State had to demonstrate an effective link with the national on whose behalf it submitted a claim; the rule was unjust in that it could lead to the denial of diplomatic protection to individuals who had changed nationality involuntarily, whether as a result of succession of States or for other reasons, such as marriage or adoption; and it failed to acknowledge that the individual was the ultimate beneficiary of diplomatic protection. In light of such criticism, it seemed necessary that the Commission reconsider the traditional position and adopt a more flexible rule, giving greater recognition to the individual as the ultimate beneficiary of diplomatic protection.

170. The Special Rapporteur stated further that, while it was possible to retain the rule with an exception made in the case of involuntary change of nationality, that would be insufficient. He thus proposed abandoning the traditional rule in favour of a new approach whereby a State would be allowed to bring a claim on behalf of a person who had acquired its nationality in good faith after the date of the injury attributable to a State other than the previous State of nationality, provided that the original State had not exercised or was not exercising diplomatic protection in respect of that injury. Several safeguards against abuse were retained: the original State of

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[1234] *I.C.J. Reports 1955*, p. 4.

nationality would still have priority; the requirements of acquisition of nationality in good faith and the existence of an effective link between the claimant State and its national would apply; and a claim could not be brought against the previous State of nationality for an injury that had occurred while the individual had been a national of that State - a safeguard that avoided the difficulties raised by, *inter alia*, the United States Helms-Burton legislation, which allowed Cubans who had become naturalized United States citizens to bring proceedings against the Cuban Government for losses incurred at the hands of that Government while they had still been nationals of Cuba. Paragraph 2 extended the new rule to the transfer of claims.

(b) Summary of the debate

171. The Special Rapporteur was commended for his even-handed treatment of the topic in his report. At the same time, it was remarked that the Rapporteur had set himself the difficult task of challenging an established rule of customary international law. Indeed, strong support was expressed in the Commission for the view that the rule of continuous nationality enjoyed the status of customary international law.

172. Support was also expressed for maintaining the traditional rule, particularly since the reasons in its favour, *inter alia*, the concern to avoid abuse on the part of individuals or States, were still applicable. Others pointed out that the main rationale for the continuity rule was not only the danger of abuse through "forum shopping", but rather the *Mavrommatis*[1235] approach to diplomatic protection, i.e. that the State was "in reality asserting its own rights". That implied that at the time of the breach the individual must have had the nationality of the State which brings the claim. In addition, the strength of State practice and the lack of evidence of an emergent principle or new practice militated against changing the rule.

173. Furthermore, it was suggested that if the Commission were to follow the suggestion of the Special Rapporteur, one condition would have to be added: that the obligation should have been in force at the time of the breach between the respondent State and the State bringing the claim on behalf of the individual which had subsequently acquired its nationality, since it was possible that the claimant State could bring a claim for infringement of an obligation which occurred at a time when that obligation was not owed to it.

[1235] *Mavrommatis Palestine Concessions case, 1924, P.C.I.J. Series A*, No. 2.

174. Conversely, there was support for the Special Rapporteur's proposal on article 9. While it was conceded that such a customary rule existed, reference was made to the doubts about the rule that had emerged over time, as expressed in numerous judgments and by several writers. It was stated that even well established rules could be changed when they no longer conformed to developments in international society, and that it was within the Commission's mandate on the progressive development of international law to propose such changes. From a practical point of view, therefore, there was an interest in the positive evolution of the institution so that it could ensure better protection of the interests of people and citizens than before. Likewise, it was disputed that States would allow themselves to be abused easily as many had adopted complex procedures for the acquisition of nationality.

175. A key issue in the debate was the relationship between diplomatic protection and the protection of individuals under international law. Those members supporting the new approach of the Special Rapporteur agreed with his evaluation that the rule of continuing nationality had outlived its usefulness in a world where individual rights were recognized by international law. It was remarked that the State in exercising diplomatic protection was not ensuring its own rights. Instead, it was seeking respect for the individual's rights. It was stated that in fact only the nationality at the time of the claim mattered.

176. Others were of the view that the general trend in international law of protecting individuals did not provide a justification for changing the rule of continuous nationality. It was emphasized that, while, in exercising such protection the State must take into consideration the human rights of the injured person, diplomatic protection was not a human rights institution per se. Nor was diplomatic protection the best mechanism for the protection of human rights, given its inherently discretionary nature. It was also pointed out that modern diplomatic protection, based largely on treaties, was highly dependent upon processes of negotiation between States in which the role of the State as "legislator" of a relationship could not be separated from the role of the State as the ultimate insurer of the rights concerned. The problem was how to provide for the rights of the individual and those of the State without upsetting the delicate balance between them.

177. At the same time, there was agreement that the rule needed to be made more flexible so as to avoid inequitable results. While those supporting the Special Rapporteur's proposal were of the view that this required revising the rule itself, most members preferred a middle course

whereby the traditional rule would be retained, albeit subject to certain exceptions aimed at those situations where the individual would otherwise have no possibility of obtaining protection by a State. It was proposed that the basic exceptions should relate to involuntary changes of nationality of the protected person, arising from succession of States, marriage and adoption. It was also proposed to extend this rule to other cases where different nationalities were involved as a result of changes to the claim arising from, for example, inheritance and subrogation. It was also suggested that further exceptions could be provided for stateless persons and for the situation where it would be impossible to apply the rule of continuity owing to, for example, the disappearance of the State of original nationality through dissolution or dismemberment. However, doubts were expressed as to, for example, the distinction between cases of "involuntary" and "voluntary" change of nationality.

178. Concerning paragraph 1 of the Special Rapporteur's proposal, it was suggested that it be recast so as to enunciate the traditional rule. Furthermore, the view was expressed that the requirement of bona fide change of nationality was too subjective and presented problems, particularly in the context of changes in nationality by legal persons. It was proposed that the requirement of an "effective" link, as espoused in the *Nottebohm* case, would be sufficient guard against abuse. It was also proposed that the reference to "change of nationality" be clarified by indicating that the original nationality had been lost, so as to avoid possible competing claims. It was also observed that the phrase was inadequate because it did not specify the applicable law nor the conditions under which such "change" occurred.

179. With regard to paragraph 2, it was suggested that a distinction be drawn between transfer of claims between legal persons and those between natural persons, and that legal persons be excluded from the scope of the draft articles. However, it was recalled that the Commission had, at its previous session, taken the view that it might at a later stage wish to reconsider the question whether to include the protection of legal persons in the draft articles at all.[1236] The Special Rapporteur confirmed his understanding that the scope of his mandate extended to the treatment of legal persons, but not to protection offered by international organizations. He indicated that

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[1236] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10*, (A/55/10), para. 495.

he intended to prepare specific provisions on the rule of continuing nationality and the transferability of claims in the context of legal persons. Serious doubts were also expressed on whether the concept of assignment was well-founded.

180. It was stated that the issue of transferability of claims required more consideration than that provided in the report. The view was expressed that paragraph 2 needed to be more restrictive so as to allow for the rule of continuity to be set aside only in regard to the situation of involuntary transfer of claims, e.g. death of the person injured, and not as regards voluntary transfers. It was also suggested that the words "international claim" be clarified.

181. Concerning paragraph 3, the view was expressed that it was undesirable to disassociate the general interest of the claimant State from that of the particular individual injured. Similarly, it was maintained that the paragraph could create confusion since it seemed to relate as much to the responsibility of States for internationally wrongful acts as to diplomatic protection.

182. While support was expressed for paragraph 4, it was proposed that it be formulated in broader terms. It was also pointed out that the provision could be problematic since under the domestic legislation of some States it was not possible for nationals to lose their nationality. As to the question of the Helms-Burton Act, the view was expressed that the possible wrongful nature of the Act had more to do with its extraterritorial application than with any inconsistency with the rule expressed in the paragraph.

183. It was suggested that the Commission consider the following additional issues relating to the nationality of claims: (1) the case of international organizations, exercising both functional protection and diplomatic protection for one of its officials (as per the *Reparations for Injuries* Opinion[1237]); (2) the right that the State of nationality of a ship or aircraft has to prefer a claim on behalf of the crew and possibly also of the passengers of the ship or aircraft, irrespective of the nationality of the individuals concerned;[1238] (3) the case where one State exercises diplomatic protection of a national of another State because the latter has delegated to the former State its right to do so; and (4) the case where a State or an international organization administers or controls a territory.

[1237] *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion), I.C.J. Reports 1949*, p. 174.

[1238] *See The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea), judgment* of 1 July 1999, para. 172.

(c) Special Rapporteur's concluding remarks

184. The Special Rapporteur reiterated his view that the Vattelian legal fiction, according to which the State protected its own interest when it acted on behalf of its national was not the foundation of the rule of continuous nationality because it implied that only the State of nationality at the time of injury could be the claimant State, regardless of whether the injured individual still retained that State's nationality at the time the claim was presented. He admitted that his proposal for draft article 9 was innovative and although support had been expressed for his proposal by some speakers, they were in the minority. However, there had been unanimous agreement that flexibility and change in some form were necessary. This was to be brought about by way of the inclusion of reasonable exceptions to the rule, particularly in the context of State succession and marriage. The Drafting Committee would also have to consider whether naturalization after a long period of residence could constitute an exception to the rule. He also recalled that several valid criticisms had been voiced, *inter alia*, in relation to the notion of a bona fide change of nationality, and that some speakers had felt that insufficient attention had been paid to the question of transfer of claims. He also observed that further consideration would have to be given to questions of the *dies a quo* and the *dies ad quem*.

2. Article 10[1239]

(a) Introduction by the Special Rapporteur

185. The Special Rapporteur, in introducing draft article 10 and the rule of exhaustion of local remedies generally, stated that it was clear that the rule was a customary rule of international law, as affirmed by the International Court of Justice in the *Interhandel*[1240] and

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[1239] Draft article 10 reads:

Article 10

> 1. A State may not bring an international claim arising out of an injury to a national, whether a natural or legal person, before the injured national has, subject to Article 15, exhausted all available local legal remedies in the State alleged to be responsible for the injury.
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> 2. "Local legal remedies" means the remedies which are as of right open to natural or legal persons before judicial or administrative courts or authorities whether ordinary or special.

A/CN.4/514, p.3.

[1240] *I.C.J. Reports 1959*, p. 6.

Elettronica Sicula (ELSI)[1241] cases. It was founded on respect for sovereignty of the host State as well as for its judicial organs. He recalled that a draft article on the exhaustion of local remedies rule had been included in the draft articles on State responsibility (draft article 22) as adopted in 1996 on first reading,[1242] but that the Commission had since decided to leave the matter to the draft articles on diplomatic protection.

186. Draft article 10 was meant to establish the context for the subsequent articles on the exhaustion of local remedies. Paragraph 1 affirmed the existence of the rule and its application both to natural and legal persons. However, it did not apply in cases involving diplomats or State enterprises engaged in *acta jure imperii*, which involved direct injury to the State and hence would not require exhaustion of local remedies.

187. The Special Rapporteur observed further that it was not always possible to maintain the distinction between primary and secondary rules throughout the draft articles on diplomatic protection. The distinction had been important for the draft articles on Responsibility of States for internationally wrongful acts, but was less so in respect of diplomatic protection. This was because the concept of denial of justice had featured prominently in most attempts at codification of the local remedies rule. Although he had previously been of the view that the question of denial of justice involved a primary rule and should not be dealt with, he had since come to think that the matter should be considered.

188. Paragraph 2 dealt with the content of the local remedies rule. All legal remedies had to be exhausted before a claim was brought at the international level. However difficulties existed concerning the definition of the term "legal remedies". It clearly included all judicial remedies available under the municipal system, as well as administrative remedies, where they were available as of right but not where they were discretionary or available as a matter of grace. He observed further that the *Ambatielos*[1243] case had raised difficulties by requiring that the claimant exhaust the "procedural facilities" available in municipal courts. The decision

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[1241] *I.C.J. Reports 1989*, p.15.

[1242] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), para. 65.

[1243] *UNRIAA*, vol. 12, p. 120.

constituted a warning that a claimant who failed to present his or her case properly at the municipal level could not reopen the matter at the international level. He also referred to the principle that the alien was required to raise before the domestic courts all the arguments that he or she intended to raise at the international level. Finally, paragraph 2 required that, for the rule to apply, the remedies in question had to be "available", both in theory and in practice.

(b) Summary of the debate

189. Support was expressed for the exhaustion of local remedies rule as being a well-established rule of customary international law. Support was also expressed for the Special Rapporteur's approach of dealing with the topic in several articles, instead of one lengthy article, although it was suggested that article 10 could be reformulated as a synthetic definition of the rule to be followed by more specific provisions. At the same time, it was observed that there was a limit to which specificity should be required, since the application of the local remedies rule was highly contextual.

190. Regarding paragraph 1, it was suggested that the reference to "international claim" be clarified and that the words "available … remedies" required closer scrutiny. In addition, it was observed that the criterion of effectiveness, which had traditionally been a facet of the rule, was missing. The view was expressed that without the addition of the qualifier "effective", the reference to "all" available local legal remedies would be too broad and would impose an excessive burden on the injured person. Conversely, doubts were expressed concerning the inclusion of an "effectiveness" requirement, since such criterion could prove highly subjective, and would inevitably lead to a discussion on the question of a fair trial - a controversial issue in international law. Furthermore, it was suggested that the reference to "natural or legal person" be deleted on the understanding that the draft articles applied both to natural and legal persons, unless expressly stated otherwise.

191. Concerning the definition of "local legal remedies", in paragraph 2, it was observed that each State regulated its remedies in accordance with its own procedures and, in many cases, constitutional law. It was suggested that the paragraph could state the purpose of the remedies to be exhausted: in some cases local remedies were available so as to prevent an injury, while in others, only in order to provide reparation.

192. As to the word "legal", it was suggested that it could include all legal institutions from which the individual had a right to expect a decision, a judgment or an administrative ruling. In terms of a further view, the word "legal" was superfluous. While support was expressed for the position of the Special Rapporteur that non-legal or discretionary remedies should be excluded from the ambit of the local remedies rule, it was observed that what was important was the result and not the means by which that result was obtained. It was queried whether the word "local" could include instituting a complaint before a regional human rights mechanism, such as the European Court of Human Rights.

193. The view was expressed that the Special Rapporteur had given an over narrow interpretation of "administrative remedies". A clarification was sought regarding the reference in the report (para. 14) to administrative remedies being obtained from a tribunal, since many such remedies were not obtainable from tribunals. It was also queried whether recourse to an ombudsman would be considered an administrative "local remedy".

194. Support was expressed for the Special Rapporteur's view that the distinction between primary and secondary rules was not necessary in all cases, and that a rigid adherence to the distinction could result in the exclusion of the concept of denial of justice. Conversely, it was stated that there was no need to introduce a provision on denial of justice, since it was an example, among others, of cases in which local remedies were not "effective".

195. Doubts were expressed regarding the "rule" in the *Finnish Ships Arbitration*,[1244] whereby the litigant was required to raise in municipal proceedings all the arguments he or she intended to raise in international proceedings. It was observed that the rule had to be applied flexibly so as to recognize that while an argument may be sufficient to substantiate a claim at the local level, it might not do so at the international level.

(c) Special Rapporteur's concluding remarks

196. The Special Rapporteur noted that, while article 10 had largely been accepted by speakers, a number of drafting suggestions had been made which would be considered by the Drafting Committee. He accepted the criticism concerning the inclusion of the phrase "natural or legal persons". He also noted that it had been his intention to deal with the question of effectiveness in a separate article. However, he recognized that it would still be necessary to

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[1244] *UNRIAA*, vol. 3, p. 1484.

indicate in article 10 that the remedy should be both available and effective, so as to reflect the prevailing view in international law. While it was true that in many instances the availability test was adequate, examples existed (as in the *Robert E. Brown Claim*[1245]) of situations where it was necessary to consider the effectiveness of the local remedy in the context of the judicial system of the respondent State, which did mean questioning the standards of justice employed in that State.

197. He explained further that paragraph 2 had been an attempt at producing a broad definition of local remedies so as to indicate that the individual should exhaust the entire range of available legal remedies. The crucial point was not the ordinary or extraordinary character of the legal remedy, but whether it provided the possibility of an effective means of redress.

198. Furthermore, he noted that there had been some criticism of the "rule" that the foreign litigant was required to raise in the municipal proceedings all the arguments he or she intended to raise in the international proceedings. He admitted that it was not without difficulties and it was for that reason that he had not included it in the provision itself.

199. On the question of the maintaining a distinction between primary and secondary rules and the advisability of including a provision on denial of justice, he noted that different views had been expressed regarding the inclusion of such a concept.

3. Article 11[1246]

(a) Introduction by the Special Rapporteur

200. The Special Rapporteur explained that draft article 11 dealt with the distinction between "direct" and "indirect" claims for the purpose of the exhaustion of local remedies rule. Such a

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[1245] *UNRIAA*, vol. 6, p. 120.

[1246] Draft article 11 reads:

Article 11

> Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national and where the legal proceedings in question would not have been brought but for the injury to the national. [In deciding on this matter, regard shall be had to such factors as the remedy claimed, the nature of the claim and the subject of the dispute.]

A/CN.4/514, p. 10.

provision was necessary in the draft articles so as to ascertain which cases fell within the scope of the draft articles. The basic principle was that the rule applied only where there had been an injury to a national of the State, i.e. where it had been "indirectly" injured through its national. It did not apply where there had been a direct injury to the State itself.

201. Two criteria were proposed for determining the type of injury involved: (1) a preponderance test and (2) a sine qua non test. He suggested that it might be sufficient to adopt only one of the tests. Under the first test, the issue was whether the injury had been preponderantly to the national of the claimant State, in which case it would be indirect and the exhaustion of local remedies rule would apply. Alternatively, under the sine qua non test, it would be necessary to establish whether the claim would have been brought but for the injury to the national of the claimant State. He observed that other criteria had also been proposed in the literature, including: the "subject" of the dispute, the "nature" of the claim; and the nature of the remedy sought. For example, if a State only claimed declaratory relief, this could be an indication that the injury was direct. However, in cases where a State sought a declaratory order as well as compensation for injury to the individual, it would be up to the Court to decide which was the preponderant factor. Furthermore, he remarked that it was necessary to guard against the possibility of a State seeking a declaratory order simply to avoid the exhaustion of local remedies rule. In his view, the additional three factors were to be considered in deciding whether the claim was "preponderantly" direct or indirect. As such, they did not require separate mention in the draft article. However, they were left in between brackets with a view to obtaining guidance from the Commission on their inclusion.

(b) Summary of the debate

202. While support was expressed for article 11, which was considered to reflect prevailing practice, it was also suggested that it required further reflection. Proposals included merging articles 10 and 11 and deleting article 11 entirely, as going beyond the scope of diplomatic protection.

203. It was observed that the terms "direct" and "indirect" injury were misleading. Reference was made to the distinction made in the French-speaking world between "dommage médiat" and "dommage immédiate" ("mediate" and "immediate" injury). "Immediate" injury was that suffered directly by the State. "Mediate" or remote injury was that suffered by the State in the person of its nationals.

204. The view was expressed that the main difficulties in the provision related to the evaluation of the "preponderance" in a situation of a mixed claim. It was further pointed out that cases could arise where a test of preponderance could not be applied because the injury suffered by the State was equivalent to that suffered by the individual. The view was also expressed that the two tests should not be seen as applying cumulatively, nor should it be required that the preponderance test be applied before the sine qua non test. It was further pointed out that while there was some support in the *Elettronica Sicula (ELSI)* case for a subjective test, what was found to be relevant in that case, as well as in the *Interhandel* case, was whether in substance there was one and the same dispute, and whether it related to an injury to a national.

205. On the question of resort to declaratory relief, it was observed that an injured State had the right to demand the cessation of the violation of the agreement, without having to first resort to local remedies.

206. Concerning the list of additional factors to be considered, the view was expressed that it might be deleted since it was not established practice to include illustrative examples in a codification text. Conversely, it was suggested that since the sentence in brackets set out criteria, rather than examples, and as any decision on the matter was inherently subjective, it would be useful to keep the sentence in brackets.

(c) Special Rapporteur's concluding remarks

207. The Special Rapporteur recalled that various drafting suggestions had been made and pointed to some further issues which would have to be considered by the Drafting Committee, including the possibility that only the preponderance test be employed. He observed that there had been a difference of opinion as to the additional factors included in brackets, and also took note of the criticism of the terms "direct" and "indirect" injury. He pointed out that while they were used in his report, they had not been used in the draft article itself.

CHAPTER VIII

UNILATERAL ACTS OF STATES

A. Introduction

208. In the report on the work of its forty-eighth session, in 1996, the Commission proposed to the General Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law.[1247]

209. The General Assembly, in paragraph 13 of resolution 51/160, *inter alia*, invited the Commission to further examine the topic "Unilateral Acts of States" and to indicate its scope and content.

210. At its forty-ninth session, in 1997, the Commission established a Working Group on this topic which reported to the Commission on the admissibility and facility of a study on the topic, its possible scope and content and an outline for a study on the topic. At the same session, the Commission considered and endorsed the report of the Working Group.[1248]

211. Also at its forty-ninth session, the Commission appointed Mr. Victor Rodriguez Cedeño, Special Rapporteur on the topic.[1249]

212. The General Assembly, in paragraph 8 of its resolution 52/156, endorsed the Commission's decision to include the topic in its agenda.

213. At its fiftieth session, in 1998, the Commission had before it and considered the Special Rapporteur's first report on the topic.[1250] As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

[1247] *Official Records of the General Assembly, Fifty-first session, Supplement No. 10* (A/51/10), p. 230 and pp. 328-329.

[1248] *Official Records of the General Assembly, Fifty-second session, Supplement No. 10* (A/52/10), paras. 196-210 and 194.

[1249] Ibid., paras. 212 and 234.

[1250] A/CN.4/486.

214. The Working Group reported to the Commission on issues related to the scope of the topic, its approach, the definition of unilateral act and the future work of the Special Rapporteur. At the same session, the Commission considered and endorsed the report of the Working Group.[1251]

215. At its fifty-first session in 1999, the Commission had before it and considered the Special Rapporteur's second report on the topic.[1252] As a result of its discussion, the Commission decided to reconvene the Working Group on Unilateral Acts of States.

216. The Working Group reported to the Commission on issues related to: (a) the basic elements of a workable definition of unilateral acts as a starting point for further work on the topic as well as for gathering relevant State practice; (b) the setting of general guidelines according to which the practice of States should be gathered; and (c) the direction that the work of the Special Rapporteur should take in the future. In connection with point (b) above, the Working Group set the guidelines for a questionnaire to be sent to States by the Secretariat in consultation with the Special Rapporteur, requesting materials and inquiring about their practice in the area of unilateral acts as well as their position on certain aspects of the Commission's study of the topic.

217. At its fifty-second session in 2000, the Commission considered the third report of the Special Rapporteur on the topic,[1253] along with the text of the replies received from States[1254] to the questionnaire on the topic circulated on 30 September 1999. The Commission at its 2633rd meeting on 7 June 2000 decided to refer revised draft articles 1 to 4 to the Drafting Committee and revised draft article 5 to the Working Group on the topic.

[1251] *Official Records of the General Assembly, Fifty-third session, Supplement No. 10* (A/53/10), paras. 192-201.

[1252] A/CN.4/500 and Add.1.

[1253] A/CN.4/505.

[1254] A/CN.4/500 and Add.1.

B. Consideration of the topic at the present session

218. At the present session the Commission had before it the fourth report by the Special Rapporteur (A/CN.4/519).

219. The Commission considered the fourth report of the Special Rapporteur at its 2693rd, 2695th and 2696th meetings on 20, 25 and 26 July 2001, respectively.

1. Introduction by the Special Rapporteur of his fourth report

220. The Special Rapporteur indicated that his fourth report dealt with two fundamental issues: the elaboration of criteria upon which to proceed with a classification of unilateral acts and the interpretation of unilateral acts, in the context of the rules applicable to all unilateral acts, regardless of their material content.

221. The Special Rapporteur noted that the report had been prepared on the basis of a wide range of literature, comments by members of the Commission and by Governments, as well as jurisprudence and some State practice referred to therein. It was stressed that, after an initial period of scepticism, most Governments had viewed the work undertaken on the topic more favourably. Furthermore, he indicated that it was important to reach agreements on the General Part of the topic, particularly as regards the structure; it did not seem, for the time being, feasible nor convenient to elaborate draft articles on special categories of unilateral acts.

222. The Special Rapporteur noted that guidance was requested of the Commission on the issues relating to the causes of invalidity of unilateral acts, the determination of the moment when the legal effects of a unilateral act come into being, which would in turn lead to determining the moment when it is opposable or enforceable. He explained that it was of fundamental importance to distinguish the moment at which the act came into being, producing legal effects while retaining its unilateral nature, from the moment at which it materialized, thus taking on a bilateral element while never losing its strictly unilateral nature.

223. As regards the issue of silence in relation to unilateral acts, the Special Rapporteur noted that silence cannot be defined as a legal act in the sense being dealt with by the Commission.

224. As regards interpretative declarations, the Special Rapporteur indicated that, in general, they were linked to a prior text, but was of the view that in cases where the declarations went beyond the obligations contained in the treaty, the declarations would become independent acts whereby a State could assume international commitments; these interpretative declarations would thus be included among the unilateral acts falling within the scope of the topic.

225. On the contrary, countermeasures, in the view of the Special Rapporteur, could not be considered within the same context because they constitute a reaction by a State, thus lacking the necessary autonomy, and because they are not expressly formulated with the intention of producing legal effects.

226. The Special Rapporteur indicated that the classification of unilateral acts was difficult; an act may be qualified in different ways and fall under one or more categories of the classical unilateral acts. He proposed to proceed with a classification based on the legal effects criterion. Consequently, there would be two major categories: acts whereby a State undertakes obligations and acts whereby a State reaffirms a right. Examples of the former include promises, waivers and even recognitions, while the latter category is exemplified by protests. He also proposed that the Commission focus itself on the acts falling under the first category previously indicated.

227. With regard to the interpretation of unilateral acts and their applicable rules, in the view of the Special Rapporteur, the rules of interpretation contained in the 1969 Vienna Convention on the Law of Treaties can constitute a valid reference in the elaboration of rules for the interpretation of unilateral acts, as was evidenced by some arbitral awards. He also affirmed that such rules of interpretation would be common to all unilateral acts. In this regard, he noted that the interpretation of an act in good faith and in relation to the context in which it took place would certainly be applicable to unilateral acts. The context would also include, for the purposes of interpretation, the preambular part of a declaration and annexes. Subsequent practice could also, according to the Special Rapporteur, be important in the interpretation of unilateral acts.

228. On the contrary, he was of the view that the object and purpose of a treaty could not be resorted to in order to interpret a unilateral act; the reasoning being that it dealt with terms specifically applicable to treaty relations. The Special Rapporteur was of the view that the supplementary means of interpretation, such as the preparatory work and the circumstances under which a unilateral act takes place, could be considered when interpreting the act. In the case of the preparatory work, though difficult to obtain in many cases, it could nonetheless be useful as a subsidiary recourse of interpretation, as jurisprudence cited in the report indicated. There was also practice by international tribunals of resort to the circumstances in order to interpret the intent of a State making a unilateral act.

229. Finally, the Special Rapporteur indicated that the two draft articles he proposed,[1255] on a general rule of interpretation and on supplementary means of interpretation, were based on the Vienna provisions yet had been modified to the specificity of the unilateral act.

2. Summary of the debate

230. Some members reiterated the importance of the topic and expressed satisfaction with references made in the report to doctrine and judicial decisions on unilateral acts, though it was also stated that additional factual information on the cases cited would be most helpful in analysing the legal validity and effects of unilateral acts.

231. It was said that more attention could be given to the incidence of unilateral acts, though it was acknowledged that this could prove rather complicated since tribunals resort to unilateral acts when there is not much else for them to rely on.

[1255] Draft article (a) reads:

> General rule of interpretation
>
> 1. A unilateral act shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the declaration in their context and in the light of the intention of the author State.
>
> 2. The context for the purpose of the interpretation of a unilateral act shall comprise, in addition to the text, its preamble and annexes.
>
> 3. There shall be taken into account, together with the context, any subsequent practice followed in the application of the act and any relevant rules of international law applicable in the relations between the author State or States and the addressee State or States.

Draft article (b) reads:

> Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work and the circumstances of the formulation of the act, in order to confirm the meaning resulting from the application of article (a), or to determine the meaning when the interpretation according to article (a):
>
> (*a*) Leaves the meaning ambiguous or obscure; or
>
> (*b*) Leads to a result which is manifestly absurd or unreasonable.

232. Some members were of the view that the topic of unilateral acts was unfit for codification, especially in light of the difficulties encountered in defining and classifying the acts. They felt that the emphasis placed on the autonomy of the acts and the concept of the "act" continued to pose difficulties; in this connection preference was voiced to speak of a "matrix of State conduct" which requires some kind of reaction by another State.

233. It was also stated that continued discussion on highly theoretical issues related to the topic tended to diminish the relative and fragile clarity which had been achieved and, in this connection, the point was made that approaching the topic in more practical terms could be more conducive to making progress on it.

234. As regards the scope of the topic, the point was made that it remained too narrow and that it should be expanded to include non-autonomous unilateral acts. In addition, hope was expressed that the issues of estoppel, particularly its relationship with waivers, and silence could be elaborated upon further. Nonetheless, support was also voiced for maintaining a restrictive definition of unilateral acts encompassing acts which create rights and obligations as a source of international law.

235. Attention was drawn to the fact that in some cases, such as effective occupation, a series of unilateral acts were needed in order for legal effects to occur, while the fourth report seemed to restrict itself to single unilateral acts. Doubts were also expressed regarding the relevance of referring to interpretative declarations and to countermeasures in the context of unilateral acts.

236. Different views were expressed regarding the classification of unilateral acts proposed by the Special Rapporteur. According to one view, there were acts which could fall under both categories, such as a declaration of neutrality according to which a State assumed not only obligations but also reaffirmed its rights, or a declaration of war. Another view considered that the second category proposed, that of unilateral acts by which a State reaffirmed rights, needed to be expanded so as to encompass acts which create or affirm rights. Still another view expressed serious doubts about the classification proposed, particularly the second category where additional light was needed on the concept of reaffirmation of rights; for example whether this category would include reaffirmation of rights over territories. It was also stated that the jurisprudence did not reflect the categories of unilateral acts which tend to feature in doctrine.

237. The point was also made that it would be possible to elaborate additional criteria for classification of unilateral acts, as suggested by some States. This could in turn serve to draw up a set of draft articles on the basis of the jurisprudence of the International Court of Justice and State practice; the Special Rapporteur could then consider drafting separate guidelines showing to which category a general rule may or may not be applicable.

238. A contrary view was expressed in the sense that classification itself was not all that important and even created unnecessary confusion; in this connection it was noted that the jurisprudence on the topic had attached much greater importance to determining whether the act was binding in nature, not the type of act involved.

239. Divergent views were expressed on the proposal by the Special Rapporteur for draft articles on the interpretation of unilateral acts. According to one view, it was premature to deal with the issue of interpretation since such an endeavour could wait until a comprehensive set of draft articles has been prepared.

240. It was also noted that the word "interpretation" was used in two ways in Part II of the fourth report: both as signifying the methodology of inquiring into whether an act was unilateral and only secondarily in its usual sense. The point was also made that the report seemed to mix the determination of criteria used to establish whether an act was indeed of a unilateral nature with the interpretation *stricto senso* of a unilateral act.

241. While some members shared the view of the Special Rapporteur that the provisions of the 1969 and 1986 Vienna Conventions could serve as a basis for developing rules of interpretation for unilateral acts, others felt that said provisions were too general to be of use for that purpose. The provisions of the Vienna Conventions could not be followed by analogy due to the rather unique nature of unilateral acts; for example the preparatory work in the case of unilateral acts could go back several decades. Hence any reliance on said provisions should be minimal.

242. It was stated that, among the rules for interpretation, one analogous to the basic rule established with regard to treaties by article 31, paragraph 1 of the 1969 Vienna Convention on the Law of Treaties, could be drafted to the effect that an act should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the act in their context and in the light of its object.

243. The point was made that a reference to the object and purpose of a unilateral act should not be omitted for the purposes of interpretation. In this regard it was noted that a State's intention when engaging in a unilateral act was relevant in two situations: in determining the existence of a unilateral act, a question that had been central to the *Nuclear Tests* case, and in determining how the act was to be interpreted, although a clear distinction between the two questions cannot always be made.

244. It was stated that the suggested draft articles contained some contradictory elements in that they posed intention as a primary criterion yet placed among the supplementary means of interpretation the main ways in which intention could be asserted in connection with a unilateral act, namely preparatory work and the circumstances at the time of the act's formulation. Some doubts were expressed on giving paramount importance to intention in the interpretation of unilateral acts and consequently preference was voiced for the approach of the International Court of Justice to give due regard to intention without interpreting unilateral acts in the light of intention. States other than the author State were entitled to rely on the act per se, not on the intention which might be subjective and which, in many cases, quite elusive. However, according to one view, the real will of the author State should constitute the decisive factor in the interpretation of unilateral acts since, in many cases, the contents of the unilateral act did not correspond to the State's real will, since it was adopted under strong pressure by other States or international public opinion and committed the State in a manner that went beyond what it might really consider necessary. There was thus a dichotomy between the real will and the declared will of the State, a matter which favoured adopting a restrictive interpretation to the unilateral act.

245. It was noted that draft article 1 on unilateral acts does not restrict such acts to a written form and that, subject to maintaining said definition, the rules for interpretation would need to be tailored accordingly since the provisions of the 1969 Vienna Convention are limited to written agreements. It was also indicated that, unlike the case of treaties, greater emphasis should be given to subjective interpretation in the case of unilateral acts.

246. Some doubts were expressed regarding the application of the concept of a preamble to unilateral acts. With regard to the context as a means of interpretation of a unilateral act, it was stated that the concept should be broadened in the case of unilateral acts taken in relation to treaties.

247. Some members were of the view that the preparatory work as a complementary means to interpret a unilateral act was acceptable with the proviso that it be reasonably accessible to the State entitled to rely on the act.

248. Several drafting suggestions were made regarding the two draft articles proposed. Several members supported the preparation by the Special Rapporteur of a report containing a consolidated text of the draft articles he had proposed so far and revisions of the two new draft articles on interpretation taking into account views expressed in the Commission.

3. Special Rapporteur's concluding remarks

249. In summarizing the debate, the Special Rapporteur noted that although some doubts remained in the context of the complexities entailed in developing the topic, most members were convinced of the importance of unilateral acts and felt that the topic could be pursued.

250. On the issue of classification of unilateral acts, the Special Rapporteur expressed his preference for the proposal put forward in his fourth report, though he did not exclude the possibility of studying, at a future time, the classical unilateral acts referred to in the doctrine. The structure of the set of draft articles should be based on the classification of the acts and a criterion of legal effects seemed valid; this would not however exclude an analysis of the effects of each unilateral act.

251. As regards the issue of State practice, his view was that some of it had been reflected in the jurisprudence, but agreed on the need to obtain additional evidence of such practice. In this connection, he indicated that the Working Group was considering the preparation of questions inviting States to provide additional information on State practice on unilateral acts.

252. Concerning the rules for the interpretation of unilateral acts, the Special Rapporteur reiterated his view that they were applicable to all kinds of unilateral acts and could therefore be included in the General Part of the set of draft articles. He agreed with the need to differentiate between the declared will and the real will of a State, but emphasized that the former gave much more legal certainty and security to international legal relations.

253. As regards the fact that the preparatory work was not necessarily accessible to all but the author State, thus placing other States in a disadvantaged position, the Special Rapporteur suggested that preparatory work be considered as part of the relevant circumstances under which the unilateral act took place.

4. The Working Group

254. At its 2695th meeting, on 25 July 2001, the Commission established an open-ended Working Group. The Working Group on Unilateral Acts of States, chaired by the Special Rapporteur, held two meetings, on 25 July and 1 August 2001. The Commission, at its 2701st meeting on 3 August 2001, took note of the oral report of the Chairman of the Working Group. At the recommendation of the Working Group the Commission requested that the Secretariat circulate a questionnaire to Governments inviting them to provide further information regarding their practice of formulating and interpreting unilateral acts.

CHAPTER IX

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Programme, procedures and working methods of the Commission and its documentation

255. At its 2676th meeting on 15 May 2001, the Commission established a planning group for the entire session.[1256]

256. The Planning Group held three meetings. It discussed section F, "Other decisions and conclusions of the Commission", of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fifth session.[1257]

257. At its 2695th meeting on 25 July 2001, the Commission took note of the oral report of the Planning Group.

258. The Planning Group considered a proposal on elections to the International Law Commission. The Planning Group was unable to take a decision on the proposal this year because it was of the opinion that the matter warranted more in-depth consideration.

259. Having taken note of paragraph 8 of General Assembly resolution 55/152 and in order to use the available time more efficiently, the Commission decided, on the Planning Group's recommendation, to give priority during the first week of the first part of its fifty-fourth session to the appointment of two Special Rapporteurs on two of the five topics included in its long-term programme of work.[1258]

260. In response to the request made by the General Assembly in paragraph 13 of its resolution 55/152, the Commission made an effort to implement cost-saving measures by organizing its programme of work in such a way as to set aside the first week of the second part of its session for the Working Group on the commentaries to the draft articles on State responsibility. The Working Group chaired by Mr. Melescanu, was composed of only 12 members of the Commission and engaged in useful preliminary review of commentaries on the topic of State responsibility.

[1256] For the composition of the Planning Group, see paragraph 5 above.

[1257] Document A/CN.4/513.

[1258] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 729.

B. Date and place of the fifty-fourth session

261. The Commission decided to hold a 10-week split session, which will take place at the United Nations Office in Geneva from 6 May to 7 June and from 8 July to 9 August 2002.

C. Cooperation with other bodies

262. At its 2698th meeting on 30 July 2001, Judge Guillaume, President of the International Court of Justice, addressed the Commission and informed it of the Court's recent activities and of the cases currently before it. An exchange of views followed. The Commission finds this ongoing exchange of views with the Court very useful and rewarding.

263. The Inter-American Juridical Committee was represented at the present session of the Commission by Dr. Gerardo Trejos Salas. Dr. Trejos Salas addressed the Commission at its 2673rd meeting on 4 May 2001 and his statement is recorded in the summary record of that meeting.

264. The European Committee on Legal Cooperation and the Committee of Legal Advisers on Public International Law of Council of Europe were represented at the present session of the Commission by Mr. Rafael Benítez. Mr. Benítez addressed the Commission at its 2700th meeting on 2 August 2001 and his statement is recorded in the summary record of that meeting.

265. The Asian-African Legal Consultative Organization was represented at the present session of the Commission by its Secretary-General, Mr. Wafik Kamil. Mr. Kamil addressed the Commission at its 2702nd meeting on 6 August 2001 and his statement is recorded in the summary record of that meeting.

266. On 2 August 2001, an informal exchange of views was held between members of the Commission and members of the legal services of the International Committee of the Red Cross on topics of mutual interest for the two institutions.

D. Representation at the fifty-sixth session of the General Assembly

267. The Commission decided that it should be represented at the fifty-sixth session of the General Assembly by its Chairman, Mr. Peter C. Kabatsi.

268. Moreover, at its 2710th meeting on 10 August 2001, the Commission requested Mr. James Crawford, Special Rapporteur on the topic of State responsibility, to attend the fifty-sixth session under the terms of paragraph 5 of General Assembly resolution 44/35.

E. International Law Seminar

269. Pursuant to General Assembly resolution 55/152, the thirty-seventh session of the International Law Seminar was held at the Palais des Nations from 2 to 20 July 2001, during the present session of the Commission. The Seminar is intended for advanced students specializing in international law and for young professors or government officials pursuing a diplomatic or academic career or posts in the civil service in their country.

270. Twenty-four participants of different nationalities, mostly from developing countries, were able to take part in the session.[1259] The participants in the Seminar observed plenary meetings of the Commission, attended specially arranged lectures and participated in working groups on specific topics.

271. The Seminar was opened by the Commission's Second Vice-President, Mr. Enrique Candioti. Mr. Ulrich von Blumenthal, Senior Legal Officer of the United Nations Office at Geneva, was responsible for the administration, organization, and conduct of the Seminar.

272. The following lectures were given by members of the Commission: Mr. Victor Rodriguez Cedeño: "Unilateral acts of States"; Mr. Ian Brownlie: "The work of the International Court of Justice"; Mr. Gerhard Hafner: "The International Criminal Court"; Mr. Bruno Simma: "Human rights and the International Law Commission"; Mr. Pemmaraju S. Rao: "International liability for injurious consequences arising out of acts not prohibited by international law"; and Mr. James Crawford: "State responsibility".

[1259] The following persons participated in the thirty-seventh session of the International Law Seminar: Ms. Minerva Acosta (Dominican Republic); Ms. Simona Alexova (Bulgaria); Ms. Uma Sekkar Balasighamani (India); Mr. Alvaro Henry Campos Solorzano (El Salvador); Ms. Sandra Charris Rebellon (Colombia); Mr. José Luis Fernandez Valoni (Argentina); Ms. Tatyana Friedrich (Brazil); Ms. Elana Geddis (New Zealand); Ms. Tira Greene (Trinidad and Tobago); Ms. Idil Isil Gul (Turkey); Ms. Xiaomei Guo (China); Mr. Guy Martial Hangui (Cameroon); Mr. Lauri Mälksoo (Estonia); Mr. Zéphyrin Maniratanga (Burundi); Mr. Yuri Marchenko (Belarus); Mr. Ivon Mingashang (Congo); Mr. Duc Pham Huu (Viet Nam); Mr. Rajesh Poudyal (Nepal); Mr. Phenyo Rakate (South Africa); Ms. Marie-Gisèle Ranampy (Madagascar); Mr. Ilia Ratchkov (Russia); Mr. Nouhoum Sangare (Mali); Mr. Barita Saragih (Indonesia); Mr. Stephan Wittich (Austria). A Selection Committee, under the Chairmanship of Professor Georges Abi-Saab (Honorary Professor, Graduate Institute of International Relations, Geneva), met on 9 May 2001 and selected 24 candidates out of 108 applications for participation in the Seminar.

273. Lectures were also given by Mr. Georges Abi-Saab: "WTO dispute settlement mechanism compared with other jurisdictions"; and Mr. Arnold Pronto, Associate Legal Officer, Office of Legal Affairs: "The work of the International Law Commission". A whole day was devoted to a visit to the European Organization for Nuclear Research (CERN), at the invitation of its Legal Counsel, Mr. Jean-Marie Dufour. The discussion focused on legal matters related to CERN. The participants in the Seminar had the opportunity to attend the opening of the High-Level Segment of the Economic and Social Council and to listen to the statement by the Secretary-General of the United Nations.

274. The participants in the Seminar were assigned to one of three working groups for the study of particular topics under the guidance of members of the Commission, as follows: "Shared natural resources" (Mr. Hafner); "Diplomatic protection of corporations" (Mr. Dugard); and "Responsibility of international organizations and member States" (Mr. Gaja). Each group presented its findings to the Seminar. The participants were also assigned to other working groups, whose main task was to prepare the discussions following each lecture and submit written summary reports on those lectures. A collection of the reports was compiled and distributed to the participants.

275. The participants were also given the opportunity to make use of the facilities of the United Nations Library.

276. The Republic and Canton of Geneva offered its traditional hospitality to the participants, with a guided visit of the Alabama and Grand Council rooms, followed by a reception.

277. Mr. Peter C. Kabatsi, Chairman of the Commission, Mr. Ulrich von Blumenthal, on behalf of the United Nations Office at Geneva, and Ms. Elana Geddis (New Zealand), on behalf of the participants, addressed the Commission and the participants at the close of the Seminar. Each participant was presented with a certificate attesting to his or her participation in the thirty-seventh session of the Seminar.

278. The Commission noted with particular appreciation that the Governments of Austria, Finland, Germany, Switzerland and the United Kingdom had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. This year, full fellowships (travel and subsistence allowance) were awarded to 16 participants and partial fellowships (covering either the subsistence allowance or travel) to 6 participants.

279. Of the 831 participants, representing 150 nationalities, who have taken part in the Seminar since 1965, the year of its inception, 483 have received a fellowship.

280. The Commission stresses the importance it attaches to the sessions of the Seminar, which enable young lawyers, especially from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 2002 with as broad a participation as possible. It should be emphasized that, as there are fewer and fewer contributions, the organizers of the Seminar have had to draw on the reserve of the Fund this year. Should this trend continue, it is to be feared that the resources of the Fund will no longer allow as many fellowships to be awarded.

281. The Commission noted with satisfaction that, in 2001, comprehensive interpretation services were made available to the Seminar. It expressed the hope that the same services would be provided for the Seminar at the next session, despite financial constraints.
